Applicant Details

First Name	**Nicholas**
Last Name	**Bottcher**
Citizenship Status	**U. S. Citizen**
Email Address	**nicholasbottcher2022@nlaw.northwestern.edu**
Address	**Address** Street **520 W Cornelia Ave Apt 311** City **Chicago** State/Territory **Illinois** Zip **60657**
Contact Phone Number	**5034676384**

Applicant Education

BA/BS From	**University of Oregon**
Date of BA/BS	**June 2012**
JD/LLB From	**Northwestern University School of Law** **http://www.law.northwestern.edu/**
Date of JD/LLB	**May 13, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Criminal Law and Criminology**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Julius H. Miner Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate
Judicial Law Clerk **No**

Specialized Work Experience

Recommenders

Kugler, Matthew
matthew.kugler@law.northwestern.edu
(312) 503-3568
Crocker, Sarah
sarahcrockerovca@gmail.com
(312) 435-5624
Bini, Mark
Mark.Bini@usdoj.gov
(718) 254-8761
Rountree, Meredith
meredith.rountree@law.northwestern.edu
(312) 503-0227
This applicant has certified that all data entered in this profile and any application documents are true and correct.

NICK BOTTCHER
520 W Cornelia Avenue, Apt. 311, Chicago, IL 60657 • nicholas.bottcher@gmail.com • 503-467-6384

May 6, 2022

The Honorable Kenneth M. Karas
United States District Court, Southern District of New York
300 Quarropas St.
White Plains, NY 10601-4150

Dear Judge Karas:
Enclosed please find an application for a clerkship in your chambers for 2024–25. I am a third-year student at Northwestern Pritzker School of Law with six years of experience working in public accounting prior to law school.

During my tenure as a financial statement auditor, I served a diverse array of clients, familiarizing myself with numerous industries and unique business processes. One of my favorite parts of being an auditor was repeatedly being exposed to new and complex issues while constantly learning alongside an amazing group of colleagues. I left public accounting to attend law school with the goal of one day advocating for victims of financial crimes as an Assistant United States Attorney in New York.

Along with my accounting background, my externship in the Northern District of Illinois for Judge Franklin Valderrama has prepared me to contribute meaningfully to your chambers. During the experience I learned how to approach legal questions as an impartial decision-maker and decipher opaque briefs to reach the conclusion that justice requires. Working with Judge Valderrama and his clerks in a collegial atmosphere confirmed my passion for legal writing and my desire to continue honing these skills as a law clerk.

My application includes a resume, law school transcript, and writing sample. Letters of recommendation from the following individuals have been added to the application by the Law School:

> Mark Bini, Former Assistant United States Attorney, Eastern District of New York
> Mbini@reedsmith.com; (718) 812-1031
>
> Sarah Crocker, Career Clerk for Judge Franklin U. Valderrama
> Sarah_crocker@ndil.gov; (608) 212-4242
>
> Professor Matthew Kugler, Northwestern Pritzker School of Law
> Matthew.kugler@law.northwestern.edu; (312) 503-3568
>
> Professor Meredith Martin Rountree, Northwestern Pritzker School of Law
> Meredith.rountree@law.northwestern.edu; (312) 503-0227

I would be thrilled to have the opportunity to interview with you for this position. Please contact me if you need any additional information.

Respectfully,

Nick Bottcher

NICK BOTTCHER
520 W Cornelia Avenue, Apt. 311, Chicago, IL 60657 • nicholas.bottcher@law.northwestern.edu • 503-467-6384

EDUCATION

Northwestern Pritzker School of Law, Chicago, IL
Candidate for Juris Doctor, May 2022
GPA: 3.81

- JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, Executive Editor
- Teaching Assistant, Criminal Law, Professor Meredith Martin Rountree, Fall 2020
- Research Assistant, Professor Emily Kadens, Summer 2020 (Mail and wire fraud)
- 2020-2021 Julius H. Miner Moot Court, Competitor (Round 4 Best Speaker)
- High-Tech Law Society, 3L Advisor; Federal Bar Association, 3L Advisor

University of Oregon, Eugene, OR
Bachelor of Arts in Accounting, *cum laude*, June 2012
GPA: 3.85

- Men's Ultimate Frisbee – UO Club Sports
- Intervarsity Campus Ministry
- Study Abroad in Sevilla, Spain, Fall 2011

EXPERIENCE

Katten Muchin Rosenman LLP, Chicago, IL
Summer Associate, May 2021-July 2021

- Wrote memoranda assessing equitable defenses for a contract dispute including estoppel, laches, and waiver.
- Drafted an answer to a complaint, interrogatories, and initial document requests for an employment dispute.

U.S. District Court, Northern District of Illinois, Chicago, IL
Judicial Extern to the Honorable Franklin U. Valderrama, January 2021-April 2021

- Assisted in drafting opinions deciding motions to dismiss, motions to remand, and motions for summary judgment.

U.S. Department of Justice, Antitrust Division, Chicago, IL
Law Student Intern, September 2020-November 2020

- Wrote memoranda analyzing joint venture defense to alleged bid rigging and assertion of attorney-client privilege.
- Drafted subpoena attachment to obtain evidence for a "no poach" investigation.
- Inspected and compared documents created by competitors for evidence of bid rigging.

United States Attorney's Office, Eastern District of New York, Brooklyn, NY
Law Student Intern, June 2020-August 2020

- Prepared response to habeas corpus petition concerning whether certain offenses are categorical crimes of violence.
- Wrote memoranda analyzing and making recommendations on issues including loss calculations for an FCPA violation, bank fraud, ineffective assistance of counsel, unlicensed money transmitting businesses, and honest services fraud.
- Wrote sentencing memoranda for securities fraud cases.
- Reviewed interview documents to determine whether statements to federal agents included admissions of guilt.

PwC, Portland, OR
Senior Assurance Associate, July 2016-May 2019;
Assurance Associate, August 2013-June 2016; *Intern*, June 2012-August 2012, January 2013-March 2013

- Supervised financial statement audits for publicly-traded and privately-held clients with annual fees as much as $4M.
- Researched accounting and auditing standards to ensure that complex transactions were recorded within the financial information in accordance with Generally Accepted Accounting Principles.
- Reviewed financial statements for accuracy of balances, internal consistency, and adequacy of disclosures.
- Examined accounting processes to find weaknesses or risks; determined the related implications for the audit.

ADDITIONAL INFORMATION

Licenses and Certifications: Certified Public Accountant, Eagle Scout

Volunteer Activities: Julius H. Miner Moot Court, Co-Chair, (2021-2022); Pro Bono Small Business Clinic (Spring 2020); Ladder Up Tax Prep (Winter 2020); PwC Friends of the Children (Winter 2017 & 2016); Catholic Charities (Fall 2013); Kids International Ministries, Philippines (Fall 2012)

Interests: Running, mountaineering, rock climbing, backpacking, brewing beer, kettlebells

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

THIS IS NOT AN OFFICIAL TRANSCRIPT

The Northwestern University School of Law permits the use of this grade sheet for unofficial purposes only.
To verify grades and degree, students must request an official transcript produced by the Law School.

Name:	**Nick Bottcher**	Total Earned Credit Hours:	77.000
Matriculation Date:	2019-09-02	Total Transfer Credit Hours:	0.000
Program(s):	Juris Doctor	Cumulative Credit Hours:	77.000
		Cumulative GPA:	3.815

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2019 Fall	3.499	BUSCOM 510	Contracts	3.000	B+	Nzelibe,Jide Okechuku
		CRIM 520	Criminal Law	3.000	A-	Nadler,Janice
		LAWSTUDY 540	Communication& Legal Reasoning	2.000	A	Holman,Rebekah
		LITARB 530	Civil Procedure	3.000	B+	Pfander,James E
		PPTYTORT 530	Property	3.000	B+	Shoked,Nadav
2020 Spring	0.000	CONPUB 500	Constitutional Law	3.000	CR	Kitrosser,Heidi D
		CONPUB 617S	Local Government Law	3.000	CR	Shoked,Nadav
		LAWSTUDY 541	Communication& Legal Reasoning	2.000	CR	Holman,Rebekah
		PPTYTORT 550	Torts	3.000	CR	Speta,James B
		PPTYTORT 650	Intellectual Property	3.000	CR	Pedraza-Farina,Laura Gabriela
2020 Summer	4.330	LAWSTUDY 712	ALW:Comm with Professionals	2.000	A+	Hill,Dana L
2020 Fall	3.835	BUSCOM 634	Derivatives	2.000	A	Kluchenek,Matthew
		BUSCOM 650	Antitrust Law	3.000	A-	McGinnis,John O
		CONPUB 754	Cybercrime	3.000	A	Kugler,Matthew Brett
		CRIM 608	Practicum: Criminal Law	4.000	A-	Main,Scott Frederick
		LAWSTUDY 717	AI and Legal Reasoning	2.000	A	Linna,Daniel Waino
2021 Winter	4.000	LAWSTUDY 696	ALW: Intro to Judicial Writing	2.000	A	Brown,Janet Siegel
2021 Spring	3.890	CONPUB 647	Practicum: Judicial	4.000	A	Wilson,Cynthia A
		CONPUB 650	Federal Jurisdiction	3.000	A-	Redish,Martin H
		CRIM 610	Constitutional Crim Procedure	3.000	A	Rountree,Meredith Martin
		LAWSTUDY 620A	Advanced Legal Writing	3.000	A	Holman,Rebekah
		LITARB 510	Complex Civil Litigation	2.000	A-	St Eve,Amy J
2021 Summer	3.890	CRIM 694	Criminal Law, Race, and Blame	1.000	A-	Nadler,Janice
		LITARB 670S	Negotiation Workshop	2.000	A	Carrel,Alyson M

Run Date: 2/14/2022 Run Time: 8:39:35 AM

Northwestern
PRITZKER SCHOOL OF LAW

UNOFFICIAL GRADE SHEET

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To verify grades and degree, students must request an official transcript produced by the Law School.

Term	Term GPA	Course	Course Title	Credits	Grade	Professor
2021 Fall	3.924	LAWSTUDY 620	Advanced Legal Research	2.000	A	Willis,Clare Gaynor
		LITARB 605	Trial Advocacy ITA	4.000	A	Lubet,Steven
		LITARB 606	Evidence (ITA)	3.000	A-	Burns,Robert P
		LITARB 730	Clinic: Litigation & Protectio	4.000	A	Tenenbaum,Jack Samuel
2022 Spring	0.000	CONPUB 600	Administrative Law	3.000		Lee,Yoon-Ho Alex
		LITARB 600P	Leg. Ethics: Public Int.&Gov	2.000		Muchman,Wendy
		LITARB 656	Remedies	3.000		Lupo,James
		LITARB 730	Clinic: Litigation & Protectio	4.000		Tenenbaum,Jack Samuel
		TAXLAW 681	Inv, Prosec & Def of Tax Crime	2.000		Johnson,Jenny Louise

Run Date: 2/14/2022 Run Time: 8:39:35 AM

NORTHWESTERN PRITZKER SCHOOL OF LAW

May 06, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am writing this letter of recommendation on behalf of Nick Bottcher. Over the last year, Nick has impressed me as an intelligent and hard-working person with great potential. I have no doubt that he will be an excellent clerk.

I first met Nick the Fall of 2020 when he took my seminar on Cybercrime. This class requires students to write a series of response papers, to participate actively in class discussion, and to write a final paper that is the product of original research. Nick did well in this environment. He wrote consistently excellent response papers, often identifying weak points in cases, including many that I had planned to raise in class or that had been the subject of academic scholarship. Looking back at his responses, he was often willing to dive more deeply into the details of the technology or doctrine than were other students. This led him to have some especially good thoughts about the Fourth Amendment and searches of computers.

For his final paper, Nick wrote about virtual asset forfeiture. As you may know, there has been an active policy debate over the last several years about the excesses of civil asset forfeiture. Some law enforcement agencies appear to have been using it too readily, exemplified in the successful 8th Amendment challenge to the forfeiture of a vehicle several years ago. Efforts to rein in these abuses creates problems in the cybercrime context, however. Cybercrime cases are sometimes brought against international actors whose persons and resources are difficult to reach with normal law enforcement tools. Cryptocurrency in particular is often both mobile and extremely difficult to trace. Seizing virtual assets promptly is therefore an important part of cybercrime enforcement.

Nick reviewed a number of proposed forfeiture reforms and identified several that would create problems in the cybercrime context. Specifically, it had been proposed that the government be liable for treble damages in the event of a successfully challenged forfeiture and also that the standard be raised to clear and convincing evidence. These, particularly in combination, could be great problems given the rapidity with which virtual forfeitures must be enacted and the difficulty of collecting international evidence. Nick analyzed the existing literature on forfeiture reform and created a proposal for exempting virtual forfeiture from those provisions.

This paper struck me as promising for two reasons. First, Nick was swimming upstream against the weight of the existing secondary literature. Given the number of forfeiture horror stories, most people writing in this area are pushing for less forfeiture without much regard to protecting forfeiture where it makes the most sense. Nick was willing to take on the extra burden of being different and insisting that, at least in this context, there was something that was truly valuable about forfeiture that should be preserved.

Second, Nick regularly checked in during his writing process and was highly responsive to feedback. He was one of those who circled back to me after the semester for further comments to incorporate as he reworked his paper into a journal note. To me, this shows that he recognizes that good writing can always be better. In a similar vein, he is enrolled in advanced legal writing this spring.

This is just one of the ways in which Nick has shown a willingness to grow and improve. He showed a similar willingness to work on public speaking. Nick tended to be quiet in class. He was always ready with intelligent comments if I called on him – I use student response papers as a basis for “warm calls” in my seminar – but he seemed to have some anxiety about talking in front of a group. This is something he has been working on, however. He competed in our moot court competition this spring and did fairly well. He has moderated and participated in panels for his student groups. As someone who also took time to warm up to public speaking, I find this to be extremely encouraging.

Nick is also capable of doing meticulous work. This is shown both in the exacting writing he did for his paper as well as his extracurricular activities. Nick is an executive editor of his journal, a position that requires him to be extremely particular about both factual and formatting citation issues. He worked for years for PwC doing high-end accounting and auditing work. He is even an Eagle Scout. All of this speaks to his ability to do the kind of ethical and precise work that is required in legal practice.

Based on my experience teaching Nick in a writing intensive course, I am very happy to recommend him. I have every reason to think that he will be an excellent clerk Please do not hesitate to contact me if there is any other information I can provide.

Respectfully,

Matthew Kugler

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

Associate Professor of Law
Northwestern Pritzker School of Law

Matthew Kugler - matthew.kugler@law.northwestern.edu - (312) 503-3568

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 South Dearborn Street
Chicago, Illinois 60604

Sarah Crocker
Career Law Clerk to the
Honorable Franklin U. Valderrama

May 06, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

It is my pleasure to strongly recommend Nicholas (Nick) Bottcher for a position as a law clerk in your Chambers.

I am a career law clerk for the Honorable Franklin U. Valderrama, a District Court Judge in the Northern District of Illinois. During my time clerking for Judge Valderrama and another District Judge in the Northern District of Illinois, I have supervised over a dozen judicial externs. Nick Bottcher is one individual I have worked with who stands out.

During his time in Judge Valderrama's Chambers, Nick wrote two full opinions deciding motions to dismiss, in addition to completing several discreet research, writing, and copyediting assignments. Nick was a strong analytical thinker and writer from the beginning of his externship, but his research became more nuanced and his written analysis simultaneously tighter and more thorough throughout the semester. Nick's quick improvement from very good to great was due to his own initiative; he not only asked thoughtful questions before beginning an assignment, but also followed up upon completion of each assignment to discuss any areas of improvement.

I supervised Nick for the second opinion that he wrote, in which the Court partially granted and partially denied a motion to dismiss a five-count employment discrimination case under 42 U.S.C. § 1981. The briefs in support and against dismissal were sparse on supporting case law, so much of Nick's research was necessarily independent. What's more, the opinion required him to research myriad questions of law he had never encountered before, including several complicated close questions. To resolve those questions, Nick and I had several long conversations during which he articulately explained the state of the law and the arguments for and against the outcome he advanced. I was impressed with his understanding of the issues and ultimately agreed with his recommendations, as did Judge Valderrama. We asked Nick to complete the opinion on a tight deadline, which he did with no complaints despite a busy semester. His final product flowed well and included thoughtful analysis about each element of each claim.

Nick's research and writing abilities are not his only strength, however. Nick was a pleasure to work with because of his enthusiasm about learning about the law—he listened to many telephonic hearings and always stayed on the phone afterwards to ask Judge Valderrama and the law clerks questions about the legal issues, the parties' arguments, and what did or did not work when advocating for a position. During those calls, and on more low-key virtual get-togethers, Nick impressed me with his wit and positive attitude. Nick was a pleasure to work with and to interact with.

If you need more information or specific examples, please do not hesitate to contact me at (608) 212-4242 or by email at sarah_crocker@ilnd.uscourts.gov. I would be happy to further elaborate on my time working with Nick.

Sincerely,

Sarah C. Crocker
Career Law Clerk to the
Honorable Franklin U. Valderrama

U.S. Department of Justice
United States Attorney
Eastern District of New York
271 Cadman Plaza East
Brooklyn, New York 11201

May 06, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Re: Clerkship recommendation for Nicholas Bottcher

Dear Judge Karas:

I write to give Nicholas Bottcher my highest recommendation as you consider him for a clerkship. I am an Assistant United States Attorney in the Eastern District of New York, and Nick interned for me during the summer of 2020. It was a difficult summer for the country, and our Office. As a result, our summer internship program was entirely remote. Despite that challenge, Nick was one of the best interns I have ever had the good fortune to work with. He worked on many complex issues, including preparing multiple memorandums considering factual and legal issues related to loss calculation and restitution in a $2 billion syndicated loan and bond fraud case involving United States and international investors, helped draft a sentencing letter in a complex securities fraud case involving a NASDAQ-traded stock, and prepared a draft brief in connection with a 2255 motion. Nick is smart, hard-working, a team player, and a pleasure to work with. He has excellent legal research skills, and he writes well. Having had the great fortune to have clerked for the late Hon. Peter K. Leisure at the beginning of my legal career, I have a good idea about the qualities that make an excellent law clerk. I think Nick possesses all of those qualities and would be a great addition to your chambers.

If you have any questions or concerns, please do not hesitate to contact me.

Very truly yours,

MARK J. LESKO
Acting United States Attorney

By: /s/ Mark E. Bini
Mark E. Bini
Assistant U.S. Attorney
(718) 254-8761

NORTHWESTERN PRITZKER SCHOOL OF LAW

May 06, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am delighted to have the opportunity to recommend Nick Bottcher to you. He was my teaching assistant for my first year Criminal Law class in Fall 2020 and this spring he was enrolled in one of my classes.

Mr. Bottcher was a terrific teaching assistant. To help manage the challenges of remote learning, I was allowed three teaching assistants. I met weekly with the team to check in on how class was going from their perspectives. Mr. Bottcher was an excellent sounding board as I worked through approaches to online instruction. In addition, he clearly developed a very collegial and productive rapport with his co-TAs.

I place a range of responsibilities on my teaching assistants, including responding to student questions, reviewing and commenting on short legal memos the first-year students write for the class, and helping them prepare for an in-class oral argument exercise. Mr. Bottcher excelled in each role, giving students specific, detailed guidance. He was an asset to me, his fellow TAs, and the students in the class.

This Spring, Mr. Bottcher was one of my students in Constitutional Criminal Procedure, a doctrinal course that covers the regulation of the police through the Fourth, Fifth, and Sixth Amendments. In our discussions, he demonstrated he reads cases carefully and analyzes them well. I was therefore not surprised that he earned an A in the class.

In closing, I will simply say that I firmly believe Mr. Bottcher would make an outstanding addition to your chambers. He does excellent work and is a real pleasure to work with. If you have any questions at all, please do not hesitate to contact me. It really is my pleasure to write to you on his behalf.

Respectfully,

Meredith Martin Rountree
Senior Lecturer
Northwestern Pritzker School of Law

Meredith Rountree - meredith.rountree@law.northwestern.edu - (312) 503-0227

NICK BOTTCHER

520 W Cornelia Avenue, Apt. 311, Chicago, IL 60657 • nicholas.bottcher@law.northwestern.edu • 503-467-6384

Writing Sample

This writing sample is a draft opinion written for Judge Franklin Valderrama as an extern in his chambers during Spring 2021. This unedited motion has been used as a writing sample with his permission.

Introduction

Plaintiff Kertray Nichols (Plaintiff) worked at Life Fitness, LLC (Life Fitness) as a Technical Support Supervisor between February 8, 2016 and April 16, 2018. Nichols requested and was granted leave by Life Fitness pursuant to the Family Medical Leave Act (FMLA), 29 U.S.C. § 2612. Following the term of FMLA leave, Life Fitness terminated Nichols' employment on April 16, 2018. Nichols filed a 15-count complaint against Life Fitness and its parent company Brunswick Corp. (Brunswick), (collectively, Defendants), alleging discrimination and retaliation under various federal and Illinois State laws. The relevant counts for the purpose of this Opinion are Counts 2, 5, 7, and 10. In Counts 2 and 7, Nichols alleges that Defendants discriminated against him in violation of the Americans with Disabilities Act (ADA). In Counts 5 and 10, Nichols alleges that Defendants retaliated against him in violation of the "Illinois State Retaliatory Discharge Law." Defendants filed a motion to dismiss Counts 2, 5, 7, and 10, pursuant to Federal Rule of Civil Procedure 12(b)(6) arguing that Nichols has failed to state a claim for ADA discrimination, as well as violation of the "Illinois Retaliatory Discharge Law". R. 29 Mot. Dismiss. For the reasons that follow, the Court grants the motion to dismiss for Counts 2, 5, 7, and 10.

Background

Nichols began working for Life Fitness, a Delaware limited liability company with an office in Illinois, on February 8, 2016 as a Technical Support Supervisor. Compl. ¶ 7. On August 14, 2017, Nichols formally requested FMLA leave from Life Fitness. *Id.* ¶ 8. Defendants approved Nichols' request for FMLA leave for the period October 16, 2017 through April 16, 2018. *Id.* ¶ 9. At the end of his FMLA leave, Defendants terminated Nichols' employment on April 16, 2018. *Id.* ¶¶ 9, 15.

"[A]t all relevant times, Kertray Nichols was a qualified person with a disability, pursuant to 42 U.S. Code § 12102." Compl. ¶ 29. Additionally, Defendants failed to provide Nichols with reasonable accommodations by prohibiting him from attending physical therapy appointments. *Id.* ¶ 30. As a result of missing therapy because of the backlash he received at work, his physical therapy was ultimately terminated. *Id.* ¶ 13. Defendants also put Nichols on probation and gave him poor performance reviews due to his disability. *Id.* ¶ 32. Nichols met the applicable job qualifications and expectations by providing his services in a satisfactory manner. *Id.* ¶ 33. Nichols alleges that he sustained lost earnings, and other damages due to the actions of Defendants. *Id.* ¶ 39.

In response, Nichols filed a multi-count complaint against Defendants. In Counts 2 and 7 Nichols alleges that Defendants discriminated against him in violation of the ADA. Compl. ¶¶ 23–39, 98–114. In Counts 5 and 10, Nichols alleges that Defendants retaliated against him in violation of the "Illinois State Retaliatory Discharge Law." *Id.* ¶¶ 66–80, 141–155. Defendants move to dismiss the Complaint based on failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Mot. Dismiss.

Legal Standard

[Omitted for brevity]

Analysis

Defendants advance several arguments in their motion to dismiss. First, Defendants argue that by failing to allege a specific disability within the Complaint, as well as how this disability substantially limited a major life activity, the Court should dismiss Counts 2 and 7 because Nichols has failed to sufficiently plead an ADA discrimination claim against the Defendants. Mot. Dismiss at 4–5. Next, Defendants argue that the Court should dismiss Counts 5 and 10 since there is no

statute entitled the "Illinois Retaliatory Discharge Law." *Id.* at 5. Alternatively, if Nichols was referring to the Illinois tort of retaliatory discharge, Defendants argue that this cause of action has been limited by Illinois courts to instances where a plaintiff has been terminated in retaliation for filing a claim under the Workers' Compensation Act or reporting illegal or improper conduct. *Id.* at 5–7. Defendants assert that neither of these situations have been alleged by Nichols; therefore, Counts 5 and 10 should be dismissed since they do not represent cognizable claims. *Id.*

In his Response, Nichols contends that Counts 2 and 7, his ADA discrimination claims, have met the notice pleading standard required by this District. R. 38 Pl.'s Resp. at 1–3. Nichols' Response also references additional facts and exhibits regarding his health issues that were not included in the Complaint. These facts indicate that Nichols suffers from a winged scapula because of a tractor-trailer accident in 2014. *Id.* at 1. Nichols continues by stating that a winged scapula is painful and disabling, resulting in a limitation of shoulder elevation, and this injury has "substantially limited [Nichols'] life activities—including his ability to work at a computer for long periods of time." *Id.* at 1, 2. The Response also mentions that "[e]veryone in [Nichols'] department knew about his underlying condition . . . [he] would sit at his desk in pain most days." *Id.* at 2. The Response also included Nichols' medical records and various communications with the EEOC as exhibits. *Id.*, Exhs. 5–8. Separately, Nichols withdrew Counts 5 and 10 in his response to Defendants' motion to dismiss. *Id.* at 6.

Defendants in their Reply ask the Court to disregard the additional facts and exhibits included within Nichols' Response since this would effectively amend the Complaint. R. 42 Defs.' Reply Br. at 2–3.

I. The ADA Claim

Defendants argue that Nichols has not alleged a plausible claim under the ADA since the Complaint does not identify any specific disability suffered, nor does it allege that a disability "substantially limited" a "major life activity." Mot. Dismiss at 4. Nichols responds arguing that he has met the notice pleading standards required in this District. Pl.'s Resp. at 2–4. The Court addresses each argument in turn.

In this Circuit, to state a claim for relief under Title I of the ADA, 42 U.S.C. § 12102(1) a plaintiff must allege facts showing that "(1) he is 'disabled'; (2) he is qualified to perform the essential function of the job either with or without reasonable accommodation; and (3) he suffered an adverse employment action because of his disability." *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013) (quoting *E.E.O.C. v. Lee's Log Cabin, Inc.*, 546 F.3d 438, 442 (7th Cir. 2008))[1]. The arguments set forth in Defendants' motion to dismiss only challenge the sufficiency of the complaint as it relates to the first prong of an ADA claim; (Mot. Dismiss) therefore, the Court will similarly focus its analysis on whether Nichols has alleged a disability under the ADA.

"The ADA defines 'disability' as '(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment;[2] or (C) being regarded as having such an impairment . . . .'" *Gogos*, 737 F.3d at 1172 (quoting 42 U.S.C. § 12102(1)). The ADA also defines "'major life activities' as including, but not limited to, 'caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting,

[1]Plaintiff in his Response to the motion to dismiss references *Foster v. Arthur Andersen, LLP*, 168 F.3d 1029, 1032 (7th Cir. 1999) for the elements of an ADA discrimination claim. Pl.'s Resp. at 3. Since the Seventh Circuit later refined the rule statement for an ADA claim, the Court has used the more recent rule statement in its analysis.

[2]The Plaintiff has attached medical records in his response brief to the motion to dismiss; however, the Court disregards these documents based on the analysis in Part II.

bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.'" *Carothers v. Cty. of Cook*, 808 F.3d 1140, 1147 (7th Cir. 2015) (quoting 42 U.S.C. § 12102(2)(A)). "An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting." *Richardson v. Chicago Transit Auth.*, 926 F.3d 881, 889 (7th Cir. 2019) (quoting 29 C.F.R. § 1630.2(j)(1)(ii)); *see also* § 1630.2(j)(1)(i) ("'Substantially limits' is not meant to be a demanding standard.").

A. Physical or Mental Impairment

Defendants argue Nichols has not satisfied the pleading requirements for an ADA claim by failing to allege a specific disability nor any facts that his disability substantially limited a major life activity. Mot. Dismiss at 4. Defendants cite two cases from this District to support this assertion.

First, in *Love v. First Transit, Inc.*, the plaintiff alleged that complications from her pregnancy caused her to leave work early, though she returned to work the following day. *Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *1, 6 (N.D. Ill. Mar. 16, 2017). The court dismissed the complaint since the plaintiff did not sufficiently plead facts to show that her disability imposed a "substantial limit" on her "major life activities." *Id.*; *see also* 42 U.S.C. § 12102(1)(A). Nichols attempts to distinguish *Love* from this case saying that the court dismissed the complaint because pregnancy is not a valid disability under the ADA. Pl.'s Resp. at 5. However, he summarizes the holding of *Love* incorrectly. The court cited authority that pregnancy-related complications can qualify as a disability under the ADA, and instead dismissed the case because the plaintiff did not plead sufficient facts to show that her alleged disability imposed a "substantial limit" on her "major life activities." *Love*, 2017 WL 1022191, at *5, 6. Even though

the plaintiff pled that her disability "substantially limit[ed] the major life activities of working, concentrating, and interacting with others", the court did not accept these conclusory pleadings. *See id.* at 6.

Defendant also cites to *Wicik*, to further support its argument. In *Wicik*, the plaintiff did not allege "if or how her 'medical disability, which includes high blood pressure and stress' substantially limits any of her major life activities other than the fact that she once took some time off of work on account of the alleged disability." *Wicik v. Cty. of Cook*, No. 17 C 6856, 2018 WL 1453555, at *5 (N.D. Ill. Mar. 23, 2018). The court noted that this deficiency was sufficient to dismiss the ADA claim. *Id.* Nichols attempts to distinguish *Wicik* saying the plaintiff failed to articulate that her disability was "qualified" under the ADA, (Pl.'s Resp. at 5) but he overlooks the requirements of *Love* and *Wicik* that a complaint must allege sufficient *facts* to show that the alleged health condition qualifies as a disability under the ADA. In his Complaint Nichols pleads that "[he] was a qualified person with a disability, pursuant to 42 U.S. Code § 12102", but does not include any facts showing that a disability substantially limited a major life activity. Compl. ¶ 29.

Nichols' Response then cites to several cases in this District in an attempt to show that conclusory notice pleading is sufficient to survive a motion to dismiss. Each of these cases does not support Nichols' assertion.

First, Nichols cites to the language in Federal Rule of Civil Procedure 8(a)(2) to demonstrate that notice pleading is the standard in this Circuit. Pl.'s Resp. at 2, 3; *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 667 (7th Cir. 2008) (quoting FED. R. CIV. P. 8(a)(2)). However, the Supreme Court in *Twombly* has interpreted Rule 8(a)(2) to require a plaintiff allege "more than labels and conclusions . . . a formulaic recitation of

a cause of action's elements will not do." *Twombly*, 550 U.S. at 545. "*Factual allegations* must be enough to raise a right to relief above a speculative level . . . ." *Id.* (emphasis added). By pleading that he "was a qualified person with a disability, pursuant to 42 U.S. Code § 12102" Nichols has alleged no facts, merely conclusions and formulaic recitations of an ADA cause of action. Compl. ¶ 29.

Nichols then cites *Murison v. Bevan* to support its claim that "[c]onclusory statements are allowed in federal pleadings." Pl.'s Resp. at 3 (citing *Murison v. Bevan*, No. 06 C 7065, 2008 WL 2561108, at *3 (N.D. Ill. June 25, 2008)). Defendants rightly point out that *Murison* does not help Nichols. Defs.' Reply at 6. Although *Murison* does permit conclusory statements in federal pleadings, the court noted that a "bald allegation" of a legal conclusion is not sufficient to survive a motion to dismiss. *See Murison*, 2008 WL 2561108, at *2. *Murison* continues, requiring that a "complaint must contain 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). The complaint in *Murison* alleged that the defendant had been involved in multiple traffic collisions and had incurred tickets for traffic violations prior to the accident involving the plaintiff, including while defendant worked for his employer. *Id.* at 1, 4. In denying the defendants' motion to dismiss, the court found that these factual allegations were sufficient to show willful and wanton entrustment since the employer was aware of the employee's bad driving record and continued to employ him and permit him to drive its vehicles. *Id.* at 4. Unlike in *Murison*, Nichols' complaint fails to plead any facts that support his "bald allegation" that he suffered from a qualified disability under the ADA.

Nichols also cites *Sanders v. City of Chicago*, which states that conclusory pleadings are sufficient for a complaint to survive a motion to dismiss. Pl.'s Resp. at 3 (citing *Sanders v. City of Chicago*, No. 98 C 5838, 2000 WL 198901, at *4 (N.D. Ill. Feb. 15, 2000)). Again, *Sanders*

predates the pleading rules set forth by *Twombly*. Additionally, the facts pled in *Sanders* are distinguishable from this case. There the plaintiff claimed that the defendant discriminated against him based on an alleged disability, emotional stress syndrome. *Id.* at 6. Although the court did not find that emotional stress syndrome falls within the protection of the ADA, it did not need to since the plaintiff pleads that he is "being regarded as having [a physical or mental impairment that substantially limits one or more major life activities]." *Id.* (quoting 42 U.S.C. § 12102(1)(C)). Since the plaintiff alleged that the defendant's doctor diagnosed him with emotional stress syndrome, and the employer reassigned him to another position because of this perceived disability, the court found that he had sufficiently pled his employer regarded him as being disabled. *Id.* Nichols' complaint does not plead any facts regarding his alleged disability, or that Life Fitness regarded him as being disabled under 42 U.S.C. § 12102(1)(C).

Finally, Nichols cites *Andriacchi*, which states that "[c]onclusory statements are sufficient in a complaint as long as they put the defendant on notice of the plaintiff's claim." Pl.'s Resp. at 4 (quoting *Andriacchi v. City of Chicago*, No. 96 C 4378, 1996 WL 685458, at *2 (N.D. Ill. Nov. 22, 1996)). However, *Iqbal* and recent Seventh Circuit authority have clearly indicated that these types of threadbare conclusions are insufficient to survive a motion to dismiss. *See Olson v. Champaign Cty., Ill.*, 784 F.3d 1093, 1099 (7th Cir. 2015); *Iqbal*, 556 U.S. at 678. Regardless, the plaintiff pled a specific disability, drug addiction, within his complaint. *Andriacchi*, 1996 WL 685458, at *2.

The Seventh Circuit has further clarified the requirements for an ADA discrimination claim, stating that complaints are required to allege a specific qualifying disability. "[S]urely a plaintiff alleging discrimination on the basis of an actual disability under 42 U.S.C. § 12102(1)(A) must allege a specific disability." *Tate v. SCR Med. Transp.*, 809 F.3d 343, 345 (7th Cir. 2015).

In his Complaint, Nichols alleges he "was a qualified person with a disability, pursuant to 42 U.S. Code § 12102." Compl. ¶ 29. However, since the Complaint does not allege a specific ailment nor facts to demonstrate how the alleged disability "substantially limits" a "major life activity", the Court has found that Nichols has failed to plead a qualifying disability under 42 U.S.C. § 12102(A).

B. Regarded as Having Such an Impairment

In his Response, Nichols suggests that Defendants were aware of his disability. Pl.'s Resp. at 4. The Court will briefly examine whether Defendants regarded Nichols as having a qualifying disability. Reiterated here, a defendant may allege a disability that substantially limits one or more major life activities under the ADA if he is "regarded as having such an impairment . . . ." *Gogos*, 737 F.3d at 1172 (quoting 42 U.S.C. § 12102(1)(C)). Nichols claims that Defendants acknowledge his disability by referencing and approving Nichols' request for FMLA leave. Pl.'s Resp. at 4. This argument conflates the ADA and FMLA. Having a "serious health condition" as defined in the FMLA does not establish a plaintiff having a "disability" as defined in the ADA. *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-CV-5999, 2018 WL 4679582, at *7 (N.D. Ill. Sept. 28, 2018); *see also Burnett v. LFW Inc.*, 472 F.3d 471, 483 (7th Cir. 2006) ("'Disability' under the ADA and 'serious health condition' under the FMLA are distinct concepts that require different analyses.") (quoting *Rhoads v. F.D.I.C.*, 257 F.3d 373, 387 n. 12 (4th Cir. 2001)). Therefore, Defendants' knowledge of Nichols' FMLA request and leave does not mean that they regarded him as having a qualifying disability under 42 U.S.C. § 12102(1)(C).

Since Nichols has failed to show that he suffered from a specific disability that "substantially limited" a "major life activity" or that his employer regarded him as having such an impairment, his complaint does not satisfy the first element of an ADA discrimination claim.

II. Additional Facts in Plaintiff's Response

Next, the Court will examine whether Nichols may allege additional facts in his response brief to save a deficient complaint. Responding to Defendants' motion to dismiss, Nichols provided further factual detail and attached health records and various communications with the EEOC to support his allegations of having a qualified disability under the ADA. Pl.'s Resp. In their Reply, Defendants argue that the new factual detail and exhibits should be disregarded by the Court since it would allow Nichols to amend his Compliant in a response brief. Defs.' Reply at 2, 3; *see Pirelli Armstrong Tire Corp. Retiree Med. Benefits Tr. v. Walgreen Co.*, 631 F.3d 436, 448 (7th Cir. 2011). The Court agrees. "Materials or elaborations in appellants' brief opposing dismissal may be considered, so long as those materials or elaborations are 'consistent with the pleadings.'" *Heng v. Heavner, Beyers & Mihlar, LLC*, 849 F.3d 348, 354 (7th Cir. 2017) (quoting *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012)). The additional facts and exhibits included in Nichols' Response are not consistent with the allegations in the Complaint. Where a complaint is "sparse" for facts, adding facts "consistent" with the complaint would amount to amending the deficient complaint. *Bruno v. Glob. Experience Specialists, Inc.*, No. 19-CV-06710, 2020 WL 5253139, at *3 (N.D. Ill. Sept. 3, 2020). "It is a 'basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss.'" *Id.* (quoting *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 348 (7th Cir. 2012)). In *Mitchell*, the plaintiff attached three exhibits to her response, expanding on her allegations in an attempt to survive a motion to dismiss. *Mitchell v. City of Plano*, No. 16-CV-07227, 2018 WL 3819110, at *9 n. 7 (N.D. Ill. Aug. 10, 2018). The court disregarded the factual allegations included in the exhibits since they would have amounted to amending the complaint through a response brief. *Id.*

Here, since accepting the new factual allegations and exhibits attached to Nichols' Response to the motion to dismiss would constitute amending the complaint, these additional facts and exhibits are disregarded by the Court.

Since Nichols has not satisfied the first element of an ADA discrimination claim, the Court does not need to examine whether the complaint satisfies the remaining elements. *See Cassimy v. Bd. of Educ. of Rockford Pub. Sch., Dist. No. 205*, 461 F.3d 932, 935–36 (7th Cir. 2006).

Conclusion

For the foregoing reasons, the Court grants Defendants' Motion to Dismiss with respect to Counts 2 and 7 without prejudice. Based on Nichols' withdrawal of Counts 5 and 10, the Court also grants Defendants' Motion to Dismiss with respect these counts, dismissing them with prejudice.

Applicant Details

First Name	**Daniel**
Last Name	**Finkelstein**
Citizenship Status	**U. S. Citizen**
Email Address	**danielfinkjd@gmail.com**
Address	**Address** **Street** **32 Redwood Ave** **City** **West Orange** **State/Territory** **New Jersey** **Zip** **07052** **Country** **United States**
Contact Phone Number	**9735703186**
Other Phone Number	**9735703186**

Applicant Education

BA/BS From	**Rutgers University-New Brunswick/Piscataway**
Date of BA/BS	**May 2014**
JD/LLB From	**Benjamin N. Cardozo School of Law, Yeshiva University** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23314&yr=2010**
Date of JD/LLB	**May 24, 2017**
Class Rank	**10%**
Law Review/ Journal	**Yes**
Journal(s)	**Cardozo Law Review**
Moot Court Experience	**No**

Bar Admission

Admission(s) **New Jersey, New York**

Prior Judicial Experience

Judicial Internships/ Externships **Yes**

Post-graduate Judicial Law Clerk **Yes**

Specialized Work Experience

Specialized Work Experience **Appellate**

Recommenders

Fernandez-Vina, Justice Faustino
fj.fernandez-vina@judiciary.state.nj.us
856-225-0076

Sceusi, Louis
louissceusi@verizon.net

Sterk, Stewart
sterk@yu.edu
212-790-0230

This applicant has certified that all data entered in this profile and any application documents are true and correct.

32 Redwood Avenue
West Orange, NJ 07052

May 9, 2022

The Honorable Kenneth M. Karas
United States District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas St.
White Plains, NY 10601-4150

Dear Judge Karas:

I am writing to apply for a clerkship with your chambers. I am currently serving as a Deputy Attorney General in the New Jersey Attorney General's Office, where I work on criminal appeals before the New Jersey Supreme Court and Appellate Division. As a Deputy Attorney General, I have briefed and argued many cases before New Jersey's two highest courts.

Before joining the Attorney General's Office, I served as a law clerk to the Honorable Faustino J. Fernandez-Vina, who then served on the New Jersey Supreme Court. As a law clerk for Justice Fernandez-Vina, I completed draft opinions and bench memoranda on merits cases, while also drafting memoranda on petitions for certification.

Before clerking for Justice Fernandez-Vina, I served as a law clerk to the Honorable Louis S. Sceusi, who then served in the Civil Part of the New Jersey Superior Court. As a law clerk for Judge Sceusi, I worked on many summary judgment motions and discovery disputes. My ability as a law clerk was first shaped as a law student at the Benjamin N. Cardozo School of Law, where I graduated in the top ten percent of my class and worked as an Alexander Fellow and intern for the Honorable Patty Shwartz of the United States Court of Appeals for the Third Circuit.

In addition to this letter, I have also provided my resume, writing sample, and law school transcript; letters of recommendation from Justice Fernandez-Vina, Judge Sceusi, and Cardozo Professor Stewart Sterk will be uploaded separately. I am available at your convenience to schedule an interview or provide additional information. Thank you for your consideration.

Respectfully,

Daniel Finkelstein

Daniel Finkelstein

Daniel Finkelstein
32 Redwood Ave., West Orange, NJ 07052
danielfinkjd@gmail.com
(973) 570-3186

EDUCATION

Benjamin N. Cardozo School of Law, New York, NY
Juris Doctor, *magna cum laude*, May 2017
Activities: *Cardozo Law Review*; Intensive Trial Advocacy Program; American Constitution Society; Sports Law Society

Rutgers University, New Brunswick, NJ
Bachelor of Arts, Political Science, May 2014

BAR ADMISSIONS

District of New Jersey; New Jersey; New York

EXPERIENCE

Attorney General's Office, Division of Criminal Justice, **Appellate Bureau**, Trenton, NJ
Deputy Attorney General, September 2019 – present
Draft briefs in criminal matters before the New Jersey Supreme Court and Appellate Division. Argue orally before the New Jersey Supreme Court and Appellate Division. Respond to petitions for habeas corpus and petitions for certification. Participate in moot courts to prepare attorneys for New Jersey Supreme Court oral arguments.

Hon. Faustino J. Fernandez-Vina, Supreme Court of New Jersey, Camden, NJ
Law Clerk, August 2018 – August 2019
Drafted opinions. Wrote memoranda analyzing petitions for certification and merits cases.

Hon. Louis S. Sceusi, Superior Court of New Jersey, Civil Part, Morristown, NJ
Law Clerk, August 2017 – August 2018
Drafted opinions on summary judgment motions and motions to dismiss. Wrote memoranda summarizing and analyzing discovery motions. Managed the calendar. Attended trials and hearings.

Hon. Patty Shwartz, U.S. Court of Appeals for the Third Circuit, Newark, NJ
Alexander Fellow, fall 2016; *Intern*, spring 2017
Completed a variety of research and writing assignments to assist in the preparation of opinions and bench memoranda. Participated in oral argument preparation sessions. Cite-checked opinions and memoranda.

Sills Cummis & Gross P.C., Newark, NJ
Law Clerk, *Employment and Labor Department*, summer 2016
Drafted a portion of an affidavit in support of an order to show cause. Researched cases for a summary judgment motion. Researched cases relating to unemployment insurance. Researched statutes and regulations for an employee handbook. Proofread briefs and corrected citations.

Prof. Marci Hamilton, Benjamin N. Cardozo School of Law, New York, NY
Research Assistant, summer 2015
Researched cases and academic publications applying and interpreting the Free Exercise and Establishment Clauses. Researched cases to respond to a motion to dismiss in a RLUIPA action. Compiled and edited sources for the publication of a new casebook on the RFRA.

Date Issued: 05-JUN-2017

Yeshiva University
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York NY 10003-4391
(212)790-0295

Daniel A. Finkelstein

Date of Birth: 01-OCT
Admit Term: Fall 2014
Program: CSL - Juris Doctor

Conferred Degree: JD 24-MAY-2017
Major1: Law

Previous Degrees:

Rutgers University BA

Events:

Writing Requirement Completed

INSTITUTION CREDIT:

Fall 2014

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	6001	Contracts I Lester Brickman	2.00	A
LAW	6202	Elements of the Law Matthew Diller	2.00	B+
LAW	6300	Civil Procedure Julie Suk	5.00	A-
LAW	6703	Torts Martin Stone	4.00	A
LAW	6792	Lawyering & Legal Writing I Michelle Movahed	2.00	B

Att-Hrs: 15.00 Ehrs: 15.00 Qpts: 55.00 GPA: 3.666
Cumu-Ahrs: 15.00 Ehrs: 15.00 Qpts: 55.00 GPA: 3.666

Spring 2015

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	6002	Contracts II Lester Brickman	3.00	A
LAW	6101	Criminal Law Kyron Huigens	3.00	A
LAW	6403	Property Melanie Leslie	5.00	A-
LAW	6501	Constitutional Law I Marci Hamilton	3.00	B+
LAW	6793	Lawyering & Legal Writing II Michelle Movahed	1.00	B

Att-Hrs: 15.00 Ehrs: 15.00 Qpts: 55.33 GPA: 3.688
Cumu-Ahrs: 30.00 Ehrs: 30.00 Qpts: 110.34 GPA: 3.677

Fall 2015

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	7103	Theories of Punishment Kyron Huigens	2.00	B

Att-Hrs: 13.00 Ehrs: 13.00 Qpts: 43.34 GPA: 3.611

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	7211	Jurisprudence Martin Stone	2.00	A-
LAW	7330	Evidence Jessica Roth	4.00	A-
LAW	7753	Prof. Responsibility Ellen Yaroshefsky	3.00	A
LAW	7814	Anatomy of An Appeal Joseph Greenaway	1.00	B+
LAW	7900	Teaching Assistant Lester Brickman	1.00	P
LAW	7939	Law Review David Rudenstine	0.00	P

Att-Hrs: 13.00 Ehrs: 13.00 Qpts: 43.34 GPA: 3.611
Cumu-Ahrs: 43.00 Ehrs: 43.00 Qpts: 153.67 GPA: 3.658

Spring 2016

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	7301	Federal Courts David Rudenstine	3.00	A-
LAW	7342B	Conflict of Laws Stewart Sterk	3.00	A
LAW	7521	Administrative Law Richard Bierschbach	3.00	A-
LAW	7528	Legislation Kate Shaw	3.00	B+
LAW	7900	Teaching Assistant Lester Brickman	1.00	P
LAW	7939	Law Review David Rudenstine	1.00	P

Att-Hrs: 14.00 Ehrs: 14.00 Qpts: 44.00 GPA: 3.666
Cumu-Ahrs: 57.00 Ehrs: 57.00 Qpts: 197.67 GPA: 3.660

Fall 2016

SUBJ	NO	COURSE TITLE	CRED	GRD
LAW	7950	Judicial Clerkship Julie Suk	10.00	P
LAW	7951	Alexander Fellows Seminar Laura Swain	2.00	B+

Att-Hrs: 12.00 Ehrs: 12.00 Qpts: 6.67 GPA: 3.333

Date Issued: 05-JUN-2017

Yeshiva University
Benjamin N. Cardozo School of Law
55 Fifth Avenue
New York NY 10003-4391
(212)790-0295

Daniel A. Finkelstein

Conferred Degree: JD 24-MAY-2017
Date of Birth: 01-OCT
Major1: Law
Admit Term: Fall 2014
Program: CSL - Juris Doctor

SUBJ	NO	COURSE TITLE	CRED	GRD

Att-Hrs: 12.00 Ehrs: 12.00 Qpts: 6.67 GPA: 3.333
Cumu-Ahrs: 69.00 Ehrs: 69.00 Qpts: 204.34 GPA: 3.648

Winter 2017

LAW	7363	Trial Advocacy-January Session Bobbi Sternheim	3.00	P

Att-Hrs: 3.00 Ehrs: 3.00 Qpts: 0.00 GPA: 0.000
Cumu-Ahrs: 72.00 Ehrs: 72.00 Qpts: 204.34 GPA: 3.648

Spring 2017

LAW	7307	New York Practice Burton Lipshie	3.00	A-
LAW	7502	Constitutional Law II Michel Rosenfeld	3.00	A
LAW	7711	Family Law Edward Stein	3.00	A-
LAW	7790	Advanced Legal Research Kathryn Mackey	1.00	P
LAW	7996	Public Sector Externship Sem Nicole Arrindell	1.00	P
LAW	7998	Public Sector Ext Field Plcmt Jennifer Kim	2.00	P

Att-Hrs: 13.00 Ehrs: 13.00 Qpts: 34.00 GPA: 3.778
Cumu-Ahrs: 85.00 Ehrs: 85.00 Qpts: 238.34 GPA: 3.666

********** **TRANSCRIPT TOTALS** **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION:	85.00	65.00	238.34	3.666
OVERALL:	85.00	65.00	238.34	3.666

********** **END OF TRANSCRIPT** **********

SUPREME COURT OF NEW JERSEY

FAUSTINO J. FERNANDEZ-VINA
ASSOCIATE JUSTICE

TWO AQUARIUM DRIVE, SUITE 330
CAMDEN, NEW JERSEY 08103

February 7, 2022

TO WHOM IT MAY CONCERN

RE: Daniel Finkelstein

Dear Sir or Madam:

Please consider this my vigorous recommendation of Dan Finkelstein for the position of Judicial Clerk.

Dan served as one of my law clerks for the 2018-2019 term. Dan is intelligent, well-versed in the law and an excellent writer. However, those accolades do not do justice in describing him. Dan is a very hard-worker, very motivated and conscientious. He also possesses a great personality, which makes working with him a pleasure. All in all, I believe he would be a fantastic law clerk and as great an asset for you, as he was for me. Coincidentally, Dan argued before us on the Supreme Court and my colleagues and I agreed he had done a fantastic job.

If you desire any further information, please contact me at (856) 225-0076.

Sincerely,

F.J. FERNANDEZ-VINA, J

FJF/d

January 25, 2022

Dear Judge:

I am very happy to give my highest recommendation to you of Daniel Finkelstein. Mr. Finkelstein was my law clerk for a year while I was assigned to the Civil Division in New Jersey Superior Court Morris County. My law clerk is responsible for scheduling and briefing all motions filed with my chambers. My docket includes normal negligence cases, medical malpractice cases, employment discrimination cases, whistle blower cases and a myriad of other complex civil litigation. He also does small claims mediation and provides research support to me while I am trying cases. Typically, we receive about 40 motions per month. I am more demanding than most judges in my briefing expectations. I require that the cases not only be briefed as to facts and legal issues, but I also demand that my law clerk provide a potential decision and that I be convinced of its soundness. Mr. Finkelstein handled his responsibilities conscientiously and flawlessly. He was required to work with other attorneys, other judges, and various personnel. He always did so with courtesy and professionalism. He is a bright, thoughtful young man, as well as an outstanding young lawyer. He will be an excellent addition to your office as he was to mine; one that you can always rely on.

If you need any further information about him, please do not hesitate to email me at louis.sceusi@njcourts.gov or call my office at (862) 397-5700,75653.

Very truly yours,

_____

Louis S. Sceusi
Judge of the Superior Court

CARDOZO

BENJAMIN N. CARDOZO SCHOOL OF LAW - YESHIVA UNIVERSITY

JACOB BURNS INSTITUTE FOR ADVANCED LEGAL STUDIES

BROOKDALE CENTER - 55 FIFTH AVENUE - NEW YORK, NY 10003-4391

Stewart E. Sterk
H. Bert and Ruth Mack
Professor of Real Estate Law
646-592-6464
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May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I write on behalf of Daniel Finkelstein, a former student of mine who is seeking a clerkship in your chambers. Daniel was an exceptionally strong student in law school, and his subsequent clerking experience with the New Jersey Supreme Court has prepared him well for a federal clerkship. I recommend him without reservation.

Daniel was a student in my Conflict of Laws during his second year of law school. The class included a number of Cardozo's strongest students, and even in that rarified company, Daniel stood out. First, his analytical skills are first-rate. I found myself turning to Daniel whenever we were discussing a difficult conceptual issue, and his analysis of those issues was never disappointing. Second, Daniel demonstrated an intellectual curiosity that distinguished him from most of his classmates. Daniel was never satisfied with surface discussion of Conflicts doctrine. Instead, his questions probed deeper, focusing on the fundamental premises on which different Conflicts theories are based, and on the consequences of different conflicts doctrines. His intellectual curiosity extended beyond the confines of the classroom, and we had a number of productive discussions after the formal class was over. Needless to say, I was not the least bit surprised when Daniel wrote an "A" exam. I am confident that Daniel's experience during and after his New Jersey Supreme Court clerkship have only honed his already impressive intellectual skills and writing abilities.

Aside from his intellectual curiosity and analytical skill, Daniel has the personal qualities that would make him an asset in the close confines of judicial chambers. Daniel is modest and personable, and he would contribute to a warm and healthy work environment. Justice Fernandez-Vina would probably be in the best position to confirm my instinct that Daniel would work quite well with other members of your chambers staff. On top of that, Daniel would represent your chambers well in contact with other chambers, lawyers, and the public at large.

In short, if I were hiring a law clerk, Daniel Finkelstein would be at or near the top of my list. I recommend him with enthusiasm.

Stewart E. Sterk

H. Bert and Ruth Mack Professor of Real Estate Law

Daniel Finkelstein
32 Redwood Ave., West Orange, NJ 07052
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(973) 570-3186

In October 2015, I wrote this bench memorandum for a course on appellate litigation taught by the Honorable Joseph A. Greenaway, Jr. of the United States Court of Appeals for the Third Circuit. I was instructed to limit my analysis to preselected cases and prepare the Supreme Court of the United States for the appeal of *United States v. Ocasio*, 750 F.3d 399 (4th Cir. 2014), *aff'd*, 578 U.S. 282 (2016). In fact, my analysis is similar to Justice Alito's subsequent opinion for the Court. I did receive feedback on an earlier draft, but only relating to the memorandum's general structure. Thus, the writing in this memorandum is my own.

Respectfully,

Daniel Finkelstein

Daniel Finkelstein

BENCH MEMORANDUM

To:	The Honorable Joseph A. Greenaway, Jr.
From:	Daniel Finkelstein
Re:	***Ocasio v. United States***, No. 14-361
Date:	October 15, 2015
Appeal From:	United States Court of Appeals for the Fourth Circuit, No. 12-4462
Argument Date:	November 5, 2015
Recommendation:	Affirm

I. INTRODUCTION

This Court has been asked to resolve a question that split the Fourth and Sixth Circuits: whether a public official can conspire to violate the Hobbs Act when he obtains property from a member of the conspiracy.

The Hobbs Act prohibits a public official from obtaining "property from another, with his consent, . . . under color of official right." 18 U.S.C. § 1951(b)(2). Samuel Ocasio, a former officer with the Baltimore Police Department, was convicted of conspiring to violate the Hobbs Act. *United States v. Ocasio*, 750 F.3d 399 (4th Cir. 2014). Ocasio claims that his conspiracy conviction should be overturned because he was convicted of conspiring with the individuals he obtained property from. Appellant's Br. 3, 26-28. Based on the Hobbs Act's text, Ocasio argues that an individual has to obtain property from someone outside the conspiracy to conspire to violate the Hobbs Act. Appellant's Br. 3, 16-18, 20-23.

The Fourth Circuit upheld Ocasio's conspiracy conviction and held that a conspiracy to violate the Hobbs Act merely requires an "agreement to engage in conduct

which would violate the statute." *Ocasio*, 750 F.3d at 411 (quoting *United States v. Brantley*, 777 F.2d 159, 163 (4th Cir. 1985)). This Court should uphold Ocasio's conspiracy conviction because the Fourth Circuit's decision accords with this Court's interpretation of conspiracy law. Further, the Fourth Circuit correctly held that the Hobbs Act's text does not preclude Ocasio's conspiracy conviction.

II. QUESTION PRESENTED, STANDARD OF REVIEW, AND SUGGESTED ANSWER

Can a public official conspire to violate the Hobbs Act when he obtains payments from a member of the conspiracy?

Standard of Review: "[W]e review de novo a question of law, including an issue of statutory interpretation." *Id.* at 408 (citing *United States v. Ide*, 624 F.3d 666, 668 (4th Cir. 2010)).

Suggested Answer: Yes.

III. FACTUAL AND PROCEDURAL HISTORY

A. Factual Background

Samuel Ocasio, while a member of the Baltimore Police Department, was involved in a kickback scheme with the owners of an auto repair shop, two brothers, Herman Alexis Moreno and Edwin Javier Mejia (the "Mejia brothers"). *Id.* at 401-02. In return for cash payments, Ocasio referred accident victims to the auto shop. *Id.* at 401-06. The payback scheme between Ocasio and the Mejia brothers was quite extensive, and both Ocasio and the Mejia brothers were charged with conspiring to violate the Hobbs Act. *Id.*

B. Proceedings Below

After a jury trial, Ocasio was convicted under the Hobbs Act for obtaining "property from another, with his consent, . . . under color of official right," 18 U.S.C. § 1951(b)(2), and for conspiring to violate the Hobbs Act under 18 U.S.C. § 371. *Ocasio*, 750 F.3d at 401. As relevant here, the general conspiracy statute prohibits persons from conspiring to "commit any offense against the United States." 18 U.S.C. § 371. On appeal, the Fourth Circuit upheld Ocasio's conspiracy conviction. *Ocasio*, 750 F.3d at 411-12.

Rejecting Ocasio's arguments, the Fourth Circuit held that the Hobbs Act's text does not preclude Ocasio's conspiracy conviction. *Id.* at 411 ("Nothing in the Hobbs Act forecloses the possibility that the 'another' can also be a coconspirator of the public official."). In addition, the Fourth Circuit distinguished between two types of actors: victims of extortion, that is, those who merely acquiesce when agreeing to pay a bribe, and active participants. *Id.* at 410-11 (citing *United States v. Spitler*, 800 F.2d 1267 (4th Cir. 1986)). Under the Fourth Circuit's approach, a defendant can conspire to violate the Hobbs Act only with active participants, but not with victims. *Id.* Because a public official's extortion of a victim would violate the Hobbs Act without constituting an indictable conspiracy, the Fourth Circuit rejected Ocasio's argument that all Hobbs Act extortions will be indictable conspiracies. *Id.*

IV. STATEMENT OF JURISDICTION

This Court granted certiorari on March 2, 2015, 135 S. Ct. 1491 (2015), and has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Fourth Circuit had jurisdiction

pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), and the District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

V. ANALYSIS

A. Conspiratorial Conduct

Ocasio's primary argument, that the Hobbs Act's text precludes his conspiracy conviction, is incorrect. The textual argument is simple: if Ocasio's conspiracy conviction is based on the payments he received from the Mejia brothers, then, Ocasio argues, it is impossible for the Mejia brothers to have conspired to obtain payments "from another." Appellant's Br. 3, 16-18, 20-23. Ocasio, therefore, stresses the importance of textualism. Appellant's Br. 16-18, 20-23, 29-30. Ocasio's approach to statutory interpretation is sound, as this Court often defers to a statute's plain meaning.

Nevertheless, it is consistent with the Hobbs Act's text to uphold Ocasio's conspiracy conviction. As the Fourth Circuit noted, "the language of the Hobbs Act does not compel" Ocasio's viewpoint. *Ocasio*, 750 F.3d at 411. Ocasio's argument is incorrect because his conviction rests upon this Court's definition of conspiratorial conduct, and that definition is compatible with the Hobbs Act's text.

This Court's definition of conspiratorial conduct is clear. In *Salinas v. United States*, 522 U.S. 52 (1997), this Court described a conspirator as one who "adopt[s] the goal of furthering or facilitating the criminal endeavor." *Id.* at 65. Moreover, the *Salinas* Court explained, a conspirator need not agree "to undertake all of the acts necessary for the crime's completion." *Id.* Under that definition, because the Mejia brothers agreed to

"facilitat[e] the criminal endeavor" by consenting to provide Ocasio with property, Ocasio and the Mejia brothers conspired to violate the Hobbs Act. *See id.*

Salinas accords with the definition of conspiratorial conduct set forth in *United States v. Holte*, 236 U.S. 140 (1915), where the Court articulated an expansive definition of conspiratorial conduct. First, writing for the Court, Justice Holmes held that an individual could be convicted of conspiracy without being capable of committing the underlying substantive offense. *Id.* at 144 ("[A] conspiracy to accomplish what an individual is free to do may be a crime."). Second, Justice Holmes held that an individual conspires to commit an offense by attempting to "bring [it] about." *Id.* Third, Justice Holmes essentially depicted this case when describing conspiratorial conduct. *See id.* at 145.

According to Justice Holmes, "a conspiracy with an officer or employee of the government . . . for an offense that only he could commit has been held for many years to fall within the conspiracy [statute]." *Id.* In this case, the Mejia brothers engaged in "a conspiracy with an officer . . . of the government . . . for an offense that only he could commit," which refutes Ocasio's contention that the Mejia brothers could not be his co-conspirators. *See id.* The Mejia brothers agreed to "bring about" this extortion scheme, and Ocasio's agreement with them is an indictable conspiracy. *See id.* at 144.

However, Ocasio could argue that *Holte* was overruled by *Gebardi v. United States*, 287 U.S. 112 (1932). Though the Court reigned in the reach of the general conspiracy statute in *Gebardi*, it did not repudiate *Holte*. In fact, the *Gebardi* Court was

careful to abide by *Holte* when reaching its decision. *Id.* at 116 ("The only question which we need consider here is whether, within the principles announced in [*Holte*], the evidence was sufficient to support the conviction."). The Court believed that *Holte* expressed a general rule governing conspiracy law and sought to apply that rule to the specific circumstances of the case. *See id.* at 117 ("In the present case we must apply the law to the evidence; the very inquiry which was said to be unnecessary to decision in *United States v. Holte*."). This Court should thus not hesitate to rely on *Holte*, as this Court did so in *Gebardi*.

Gebardi's reasoning, however, could be interpreted to limit the reach of the conspiracy statute. In *Gebardi*, the Court focused on the scope of the underlying substantive offense, the Mann Act, 18 U.S.C. § 2421, because Congress elected not to criminalize the defendant's conduct under that act. *Id.* at 118-19. This Court, therefore, was hesitant to criminalize an action through the conspiracy statute when Congress declined to proscribe it under the substantive offense. *Id.* at 119–23. The Court's viewpoint, however, was questionable.

If the conspiracy statute renders an agreement unlawful, that agreement should not be condoned because Congress did not criminalize it under the underlying substantive offense. After all, *Gebardi*'s reasoning is contradicted by the idea that a "conspiracy is a distinct evil . . . and so punishable in itself." *Salinas*, 522 U.S. at 65 (citing *Callanan v. United States*, 364 U.S. 587, 594 (1961)). In any event, the Court's logic would not extend to Ocasio; Ocasio's actions were indictable under the Hobbs Act.

B. Federalism

This Court must address another concern Ocasio raises: Ocasio argues that the Fourth Circuit's ruling, by allowing bribe-payers to be co-conspirators, equates all Hobbs Act conspiracies with bribery. Appellant's Br. 19, 36, 42-44. Because the "States have criminal laws prohibiting their citizens from bribing public officials," such an equivalence could be problematic. *See United States v. Brock,* 501 F.3d 762, 769 (6th Cir. 2007). The Sixth Circuit, when holding that a bribe-payer cannot conspire to violate the Hobbs Act with a bribe-taker, was persuaded by this argument. *See id.* at 768-69.

The Fourth Circuit, in contrast, held that there could be Hobbs Act violations that would not constitute indictable conspiracies. *Ocasio*, 750 F.3d at 411. The Fourth Circuit came to that conclusion by distinguishing victims of extortion, that is, those who merely acquiesce when agreeing to pay a bribe, from active participants. Under this distinction, active participants are considered both bribe-payers and co-conspirators, whereas victims are considered bribe-payers, thus allowing for a Hobbs Act violation, but not co-conspirators, thus precluding a Hobbs Act conspiracy. *See id.*

The Fourth Circuit's approach is misguided because many Hobbs Act conspiracies are analogous to bribery agreements. It is true that certain violations of the Hobbs Act may involve a victim, because extortion can be "induced by wrongful use of actual or threatened force, violence, or fear." 18 U.S.C. § 1951(b)(2). However, when a public official obtains "property from another, with his consent, . . . under color of official right," *id.*, the public official is conspiring with a consenting participant, and the Fourth

Circuit's distinction between victim and active participant is therefore not practical. *Brock,* 501 F.3d at 771. In other words, no victim can agree to violate the Hobbs Act under the color-of-official-right element, and every conviction for conspiring to violate that element of the Hobbs Act is by definition a conviction for a bribery agreement.

Since a conviction for conspiring to violate the Hobbs Act's color-of-official-right provision is simply a conviction for a bribery agreement, federalism concerns will be implicated because bribery is predominantly governed by the states. Over twenty years ago, members of this Court were dismayed by the Hobbs Act's expansion. *See Evans v. United States*, 504 U.S. 255, 290-94 (1992) (Thomas, J., dissenting). In *Evans*, Justice Thomas argued that the Hobbs Act was reaching into an area of state concern. *See id.* Justice Thomas observed how "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States" and thus argued that this Court should "not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 292 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). Nevertheless, these concerns are unpersuasive because the conspiracy statute clearly prohibits conspiracies "to commit *any* offense against the Unites States," thereby removing any doubt as to Congress' intent. 18 U.S.C. § 371 (emphasis added).

C. Conclusion

In conclusion, Ocasio's arguments are incorrect because the Mejia brothers can be bribe-payers and co-conspirators at the same time. Their agreement with Ocasio

furthered the criminal endeavor. They agreed to provide Ocasio with property, and obtaining property from another is an element of the Hobbs Act. *Id.* § 1951(b)(2). While it would be odd to use the Hobbs Act's text in certain contexts—it would be strange, for instance, for the Mejia brothers to state that they helped Ocasio obtain property "from another"—that does not prevent the Mejia brothers from being bribe-payers and co-conspirators at the same time. In short, Ocasio conspired to violate the Hobbs Act.

VI. RECOMMENDATION

For the reasons stated, this Court should affirm the judgment of the Fourth Circuit.

Applicant Details

First Name	**George**
Middle Initial	**L.**
Last Name	**Frank**
Citizenship Status	**U. S. Citizen**
Email Address	**frankg22@pennlaw.upenn.edu**
Address	**Address** Street **130 East 67th Street, apt. 6-A** City **New York** State/Territory **New York** Zip **10065** Country **United States**
Contact Phone Number	**917-747-5376**

Applicant Education

BA/BS From	**Washington & Lee University**
Date of BA/BS	**May 2019**
JD/LLB From	**University of Pennsylvania Law School** **https://www.law.upenn.edu/careers/**
Date of JD/LLB	**May 16, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Pennsylvania Journal of Constitutional Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Fisch, Jill E.
jfisch@law.upenn.edu
(215) 746-3454

Ortiz, Karen
karen.ortiz@eeoc.gov
9295065296

Burke, Sean
Sean.Burke@ogc.upenn.edu
215-746-5254

This applicant has certified that all data entered in this profile and any application documents are true and correct.

George L. Frank
130 East 67th Street, Apt. 6A, New York, NY 10065
917-747-5376, frankg22@pennlaw.upenn.edu

May 10, 2022

The Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
300 Quarropas St.
White Plains, NY 10601-4150

Dear Judge Karas,

I have just completed my final year at the University of Pennsylvania Law School and am writing to request your consideration of my application for a clerkship. I am deeply interested in litigation and the judiciary.

This past summer, I worked in the litigation group at Simpson Thacher & Bartlett in New York City and have accepted an offer to join the group as an Associate starting in October. During my time at Simpson, I drafted several subpoenas, two memoranda of law, affirmations, notices, interrogatories and document requests (as well as responses to both), a confidentiality order, a discovery agreement, a settlement agreement, and a portion of a sentencing submission. I also conducted a great deal of legal research.

The basic skills I relied on during my summer at Simpson were first developed as a student of Legal Practice Skills at Penn Law and during my judicial internship with Administrative Judge Karen M. Ortiz at the Equal Employment Opportunity Commission. During my time with Judge Ortiz I drafted four decisions on motions for summary judgment and several case management orders. I also reviewed numerous records of investigation in order to recommend rulings to the judge.

Prior to law school, I worked for three summers as a legal assistant at two large law firms (Cravath Swaine and Kramer Levin) in both the litigation and corporate groups. Through all of these experiences, I learned to deal with sensitive subject matter and strict deadlines, and to communicate effectively in a legal setting. I believe that these attributes would make me a strong addition to your chambers.

I have enclosed my resume, transcript, recommendation letters, and writing sample. Please let me know if there is any additional information that I can provide to support my candidacy. I appreciate your time and consideration.

Sincerely,

George Frank

George L. Frank

130 East 67th Street, Apt. 6-A, New York, NY 10065
917-747-5376, frankg22@pennlaw.upenn.edu

Education:

University of Pennsylvania Law School - *Philadelphia, PA*
J.D. Candidate, May 2022
Honors: Senior Editor – *University of Pennsylvania Journal of Constitutional Law*
Activities: Morris Fellow – *2020-2021 Morris Fellows Program*

Washington and Lee University – *Lexington, VA*
B.A., Major in History, Minor in Africana Studies, *magna cum laude*, May 2019
Honors: Phi Beta Kappa, John Preston Moore III Award for Excellence in History
Activities: Student Search Committee, History Department; Vice-President and Chief of the Judicial Board for the Sigma Chi Fraternity, Zeta Chapter

Experience:

Simpson Thacher & Bartlett – *New York, NY*
Litigation Summer Associate Summer 2021

- Drafted subpoenas, memoranda of law, affirmations, notices, interrogatories, document requests, a confidentiality order, a discovery agreement, a settlement agreement, and a portion of a sentencing submission
- Conducted extensive legal research for several litigation matters

U.S. Equal Employment Opportunity Commission - *New York, NY*
Judicial Intern for Administrative Judge Karen M. Ortiz Summer 2020

- Drafted decisions, notices, and case management orders
- Assessed cases based on motions and reports of investigation

Cravath Swaine & Moore - *New York, NY*
Litigation Legal Assistant Summer 2018

- Supported lawyers and paralegals in the Litigation Department
- Prepared and reviewed material in preparation for trial
- Organized case material earmarked for offsite storage

Corporate Legal Assistant Summer 2017

- Supported lawyers and paralegals in the Corporate Department
- Drafted due diligence memoranda

Kramer Levin Naftalis & Frankel - *New York, NY*
Litigation Legal Assistant Summer 2016

- Supported lawyers and paralegals in the Litigation Department
- Compiled material for deposition binders
- Reviewed trial materials

Interests:

- Squash/Tennis, Long-distance running, Exploring the city with my dog

UNIVERSITY of PENNSYLVANIA

OFFICE OF THE UNIVERSITY REGISTRAR

CLAIRE WALLACE
LAW SCHOOL, REGISTRAR

RECORD OF WORK DONE

RECORD OF
ID NUMBER
DATE OF ISSUE

GEORGE LINCOLN FRANK
61827223 BIRTHDATE: 12/17/96
05/10/22

[*]
[AT THE LAW SCHOOL]
[*]

* * * * * * * * * ACADEMIC PROGRAM * * * * * * * * * * *

School: LAW
Division: LAW
Degree Program: JURIS DOCTOR
Major: LAW

* * * * * UNIVERSITY OF PENNSYLVANIA COURSE WORK * * * * * *

Fall 2019		**LAW**			
LAW	500	Civil Procedure (Burbank) - Sec 2	4.00	SH	B
LAW	502	Contracts (Katz) - Sec 2A	4.00	SH	B+
LAW	504	Torts (Hoffman,A) - Sec 2	4.00	SH	A
LAW	510	Legal Practice Skills (Govan) - Sec 2A	4.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Pritchard)	(0.00)	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	16.00	SH	
Spring 2020		**LAW**			
LAW	501	Constitutional Law (Berman) - Sec	4.00	SH	CR
LAW	503	Criminal Law (Heaton) - Sec 2A	4.00	SH	CR
LAW	510	Legal Practice Skills (Govan) - Sec 2A	2.00	SH	CR
LAW	512	Legal Practice Skills Cohort (Pritchard)	(0.00)	SH	CR
LAW	780	Immigration Law (Chang)	3.00	SH	CR
LAW	799	Intro to Philosophy of Law (Perry)	3.00	SH	CR
		Term Statistics:	16.00	SH	
		Cumulative:	32.00	SH	
Fall 2020		**LAW**			
LAW	508	Property (Parchomovsky)	3.00	SH	A-
LAW	622	Corporations (Fisch)	4.00	SH	A
LAW	631	Evidence (Levy)	4.00	SH	A-
LAW	828	Journal of Constitutional Law - Associate Editor	1.00	SH	CR
LAW	998	Juvenile Justice Seminar (Feierman/Levick)	3.00	SH	A
		Term Statistics:	15.00	SH	
		Cumulative:	47.00	SH	

(No further entries this column)

* * * * * UNIVERSITY OF PENNSYLVANIA COURSE WORK * * * * * *

(Continued from previous column)

Spring 2021		**LAW**			
LAW	555	Professional Responsibility (Reich)	2.00	SH	B+
LAW	641	Employment Law (Burke)	3.00	SH	A-
LAW	748	Criminal Procedure: Prosecution and Adjudication (Bibas)	3.00	SH	A-
LAW	773	Mergers and Acquisitions (Pollman)	3.00	SH	A-
LAW	828	Journal of Constitutional Law - Associate Editor	(0.00)	SH	CR
LAW	920	Pharmaceutical Regulation and Enforcement (Davar)	3.00	SH	A-
		Term Statistics:	14.00	SH	
		Cumulative:	61.00	SH	
Fall 2021		**LAW**			
LAW	649	Interdisciplinary Child Advocacy Clinic (Finck)	6.00	SH	A
LAW	705	Mental Health Law (Morse)	3.00	SH	B+
LAW	828	Journal of Constitutional Law - Senior Editor	1.00	SH	CR
LAW	933	Litigating Across Borders (Wang)	3.00	SH	A
		Term Statistics:	13.00	SH	
		Cumulative:	74.00	SH	
Spring 2022		**LAW**			
LAW	585	Law Reform Litigation (Aronchick)	1.00	SH	A
LAW	676	Election Law (Abel)	2.00	SH	A
LAW	724	Local Government Law (Feder)	3.00	SH	A
LAW	828	Journal of Constitutional Law - Senior Editor	(0.00)	SH	CR
LAW	902	General Counsel (Biben)	3.00	SH	A
LAW	980	Corruption, Fraud and Corporate Crimes (Lee/Zach)	3.00	SH	A
		Term Statistics:	12.00	SH	
		Cumulative:	86.00	SH	

(No further entries this column)

PAGE 1 OF 2

UNIVERSITY of PENNSYLVANIA

OFFICE OF THE UNIVERSITY REGISTRAR

Claire Wallace

CLAIRE WALLACE
LAW SCHOOL, REGISTRAR

RECORD OF WORK DONE

RECORD OF
ID NUMBER
DATE OF ISSUE

GEORGE LINCOLN FRANK
61827223 BIRTHDATE: 12/17/96
05/10/22

[*]
[AT THE LAW SCHOOL]
[*]

* * * * * * * * * * * COMMENTS * * * * * * * * * * * * *

In response to the COVID-19 pandemic, specific divisions within the University of Pennsylvania granted alternate grading options for academic terms that were impacted. See COVID-19 Alternate Grading Policies in the Archives of University Catalogs for details.

Senior Writing Requirement - fulfilled through Juvenile Justice Seminar (Feierman/Levick); Public Service Requirement Satisfied;

* * * * * NO OFFICIAL ENTRIES BEYOND THIS POINT * * * * * *

PAGE 2 OF 2

UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL

May 10, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Re: Clerkship Applicant George Frank

Dear Judge Karas:

It gives me great pleasure to recommend George Frank, Penn Law JD Class of 2022, for a clerkship in your chambers. Mr. Frank was my student in corporations during the Fall 2020 academic term. Mr. Frank received an A which reflected both his active and thoughtful contributions during the semester and the fact that he wrote an outstanding exam – one of the best in the class. I note that this grade was consistent with Mr. Frank's strong academic record at Penn.

Law school has presented particular challenges over the past year because of the pandemic. I taught corporations in a hybrid environment, which meant that the students had to navigate complex covid protocols in addition to their regular coursework. In this difficult setting, Mr. Frank was an absolute pleasure to have in the class – he was consistently prepared, engaged and thoughtful. I got to know Mr. Frank during my weekly rooftop office hours, and I came to appreciate his intelligence and dedication as well as his enthusiasm for business law. He also impressed me as both professional and personable. I expect that these same qualities would make him a pleasure to work with in chambers.

I have spoken with Mr. Frank in detail about his interest in a clerkship. It is my understanding that he would prefer to begin a clerkship in 2024 and to have the opportunity to get some work experience beforehand (he plans to work at Simpson Thacher in New York this summer).

I would be delighted to speak with you further about George. Please let me know if I can provide any additional information.
Sincerely,

Jill E. Fisch
Saul A. Fox Distinguished Professor of Business Law
Co-Director, Institute for Law and Economics
Tel.: (215) 746-3454
E-mail: jfisch@law.upenn.edu

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

33 Whitehall Street, 5th Floor
New York, NY 10004-2112
For General Information: (800) 669-4000
TTY: (800)-669-6820
District Office: (929) 506-5270
General FAX: (212) 336-3625

Karen M. Ortiz
Administrative Judge
Phone: (929) 506-5296
Fax: (212) 336-3621
E-mail: KAREN.ORTIZ@EEOC.GOV

August 28, 2020

To Whom It May Concern:

I am pleased to write this letter of recommendation for George Frank, Penn Law School Class of 2022. George earned a coveted spot this summer in the EEOC New York District Office's Judicial Internship Program. He thoroughly impressed me and my colleague Administrative Judge Monique Roberts-Draper during the internship vetting process and it was immediately evident when the summer began that George would be a standout Judicial Intern.

Even in the midst of a worldwide pandemic and the EEOC's necessary pivot to a virtual internship, George was unflappable, positive, and wholly engaged in every aspect of the program. He easily absorbed the substantive law required for adjudication of discrimination claims under Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008. I was confident assigning George more complex research and writing projects. One of George's best attributes is that he is an active listener and collaborator. He made sure that he understood what was being asked of him and, if there was any doubt, he made sure to clarify any issues before diving into an assignment.

George exceled at transforming his research into draft decisions ready for my signature. He was able to complete a high volume of complicated assignments over the span of his internship, including four decisions on summary judgment motions and various case management orders. By the close of our time together George had a full grasp of the EEOC's federal sector hearings process and a genuine understanding of its real life consequences. I give George my most robust endorsement!

Sincerely,

Karen M. Ortiz
Administrative Judge

UNIVERSITY OF PENNSYLVANIA

May 10, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Re: Clerkship Applicant George Frank

Dear Judge Karas:

I am honored and very pleased to write a recommendation for George Frank, of the University of Pennsylvania Carey Law School's class of 2022. George is an applicant for a clerkship position in your chambers, and in what follows I wish to provide him an enthusiastic recommendation.

George was in my Employment Law class in the spring semester of 2021. He is an outstanding student, having distinguished himself in a very strong class through hard work and a commitment to engaging with the course, the materials, the instructor, and his fellow students. He has an impressive capacity to interpret the law and legal problems, but what is most notable is his dedication to learning and achievement. In class, he was always prepared, and always ready to participate with insight. During the term, there were two grade-based assessments: a midterm writing project and a final examination. Every student was expected to submit a revised midterm writing project to improve her or his grade. Some inevitably do this in a perfunctory manner; others give it more attention. I don't think I have ever had a student who was so clearly committed to understanding every aspect of the case under study and the relevant law as George was – he was intent not just on succeeding with the project, but also ensuring that he took from it the most valuable educational experience possible. His performance on the final examination also was excellent, among the top students in the class.

George is an excellent writer, an attribute that demonstrates clarity and organization in his thought as well as his dedication to the craft. George's reasons for wanting to clerk also are to my mind exactly the right ones: He wants to practice law, so he wants to see how different practitioners approach the court and their cases, as well as to understand how judges rule on the issues before them.

I should highlight as well George's professional, friendly demeanor, which I view as another important qualification. George is the kind of person who will be dedicated, reliable, upbeat, and effective – simply put, a true pleasure to have around. I believe he is an exceptional candidate, and I encourage you to give him close consideration. If I can be of further assistance, please do not hesitate to contact me.

Respectfully,

Sean V. Burke
Associate General Counsel
215-746-5254
sean.burke@ogc.upenn.edu

George L. Frank
130 East 67th Street, Apt. 6-A, New York, NY 10065
917-747-5376, frankg22@pennlaw.upenn.edu

Writing Sample

I prepared the attached draft when I was a judicial intern for Administrative Judge Karen M. Ortiz at the Equal Employment Opportunity Commission. It is a fifteen-day notice alerting the parties to an intent to issue a decision without a hearing (summary judgment). All identifying names have been altered using a random name generator for confidentiality purposes.

I am submitting the attached writing sample with the permission of Judge Ortiz.

UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT
33 Whitehall Street, New York, NY 10004-2112

In the matter of:

[redacted],

Complainant,

v- **ORDER**

[redacted],

Agency.

EEOC Hearing Number: [redacted]
Agency Case Number: [redacted].

NOTICE OF INTENT TO ISSUE A DECISION WITHOUT A HEARING (SUMMARY JUDGMENT)

The U.S. Equal Employment Opportunity Commission received a request for a hearing from Donna Nelly (Complainant) in the above-captioned matter. After a review of the Record of Investigation (ROI), the Administrative Judge assigned to this matter has determined that the material facts of this case do not appear to be in dispute, and that it may therefore be appropriate to issue a decision without a hearing. *See* 29 C.F.R. § 1614.10 n9 (g) (3).

I. Claim to be Decided

The claim to be decided is whether Complainant was subjected to discrimination on the basis of age (71; D.O.B.: August 1947) when on or around January 20, 2018, Complainant became aware that she was not afforded the same opportunity to apply for the GS-1102AY-12 Contract Specialist position advertised under Vacancy Announcement Number 1812104KEMP.

II. Procedural History

Complainant made initial contact with an EEO Counselor on August 1, 2018. ROI at 19. Complainant received the Notice of Right to File on or about October 31, 2018. ROI at 19. Complainant filed a formal complaint on November 13, 2018. ROI at 1. Complainant's complaint was accepted and referred for investigation on January 24, 2019. ROI 11. Complainant requested a hearing within thirty calendar days after receiving a copy of the Report of Investigation on April 30, 2019. ROI at 3.

III. Statement of Material Facts

Complainant believes she was subjected to disparate treatment on the basis of her age in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*. when on January 20, 2018 she was denied fair opportunity to apply for the GS-1102AY-12 Contract Specialist position advertised under Vacancy Announcement Number 1812104KEMP. ROI at 30. Prior to 2018, Complainant had served as a government contractor in the role of contract administrator for thirteen years with the General Services Administration (GSA), Federal Acquisition Services (FAS), and Assisted Acquisition Services (AAS). ROI at 17. The job posting for the Contract Specialist position was posted on November 1, 2017 under Vacancy

Announcement Number 1812104KEMP. ROI at 53. The vacancy closed on November 11, 2017. ROI at 53. The vacancy was open to all applicants and applications were to be submitted between November 1 to November 11, 2017. ROI at 53. Complainant did not apply to the vacancy during the open period (or at any point). ROI at 37, 46, 51. Complainant alleges that she was not aware that the vacancy had been advertised. ROI at 37. The position required "A 4-year course of study leading to a bachelor's degree with a major in any field; or at least 24 semester hours in any combination of the following fields: accounting, business, finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management" with the exception provision that "if you occupied a GS-1102 position of the GS-5 through GS-12 on January 1, 2000, you are considered to meet the basic requirement." ROI at 70. Complainant has a high school degree and does not meet the exception provision to the education requirement. ROI at 36. Complainant claims that Responsible Management Official (RMO) Janet Lang added the degree requirement to the vacancy posting to exclude her from consideration for the position. ROI at 38. Complainant further alleges that despite knowing about her interest in the position, Ms. Lang intentionally failed to inform her about the vacancy while simultaneously alerting the eventual selectee, Ms. Rosario, to the opening. ROI at 37-38.

IV. Legal Standard for Issuing a Decision Without a Hearing

Federal Sector EEO complaints are governed by regulation 29 C.F.R. §1614.109(g)(1) and (2), which provides for the issuance of summary judgment, otherwise known as a decision without a hearing. The Commission's summary judgment standard is patterned after Rule 56 of the Federal Rules of Civil Procedure. Rule 56 states that the court may grant summary judgment

where there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). Only facts that are truly material to the outcome of the case are considered within the summary judgment standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Mere allegations, denials, legal arguments, or a showing that there is some metaphysical doubt as to the material facts will not be enough to oppose summary judgment. *Matsushita Elec. Indus. Co.*, 475 U.S. at 586; *Anderson,* 477 U.S. at 256. Summary judgment is also proper where a party fails to establish an essential element of his or her case on which he or she bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

V. Applicable Substantive Law and Analysis

Complainant's allegation invokes the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq*. The ADEA states that in the federal government, "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age…shall be made free from discrimination based on age." 29 U.S.C. § 633a(a). A complaining party may bring an action seeking redress for unlawful discrimination where an employer's conduct constitutes "disparate treatment," meaning the complaining party was the subject of "an adverse employment consequence" as a result of "discriminatory intent by his employer." *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 767-70 (1998) (Scalia, J., dissenting) (defining disparate treatment). The court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) lays out a three-part evidentiary framework to guide the analysis of disparate treatment claims. First, a complainant must establish a prima facie case by demonstrating that she applied for a position for which she was qualified, but "was rejected under circumstances which give rise to an interference of unlawful discrimination." *Texas Dep't of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 253 (1981); *see Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 577 (1978) (stating that a successful *prima facie* case will raise an inference that the agency's action was, more likely than not, based on impermissible factors). A complainant accomplishes this by showing by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she was qualified for her job and performed it satisfactorily; (3) she suffered an adverse employment action; and (4) employees outside of her protected class were treated more favorably under similar circumstances giving rise to an inference of discrimination. *See McDonnell Douglas*, 411 U.S. at 802.

If a complainant succeeds in establishing a prima facie case, the burden shifts to the agency to provide a legitimate, nondiscriminatory reason for its actions. *McDonnell Douglas*, 411 U.S. at 802. The agency does not have to prove that the reasons for its actions were lawful. Rather, it only has to produce admissible evidence that leads to the rational conclusion that the employment decision was not motivated by discriminatory animus. *Burdine*, 450 U.S. at 257. Once the agency has met its burden, the complainant is provided the opportunity to demonstrate by a preponderance of the evidence that the reasons proffered by the agency were not the true reason for the employment decision, but rather mere pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 411 U.S. at 256; *Weinstock v. Columbia Univ*., 224 F.3d 33, 42 (2d. Cir 2000). It is important to note that the complainant at all times bears the burden of persuasion to prove by a preponderance of the evidence that the agency acted on the basis of a prohibited reason. *McDonnell Douglas*, 411 U.S. at 804-805.

Based on my preliminary review of the record, I do not believe that the Complainant can meet her burden in this case. First, I do not believe that the Complainant has established a prima facie case of discrimination. The court in *Turner v. General Services Administration*, EEOC

Appeal No. 01852922, at *2 (June 4, 1986) states that a complainant who does not apply for a position forgoes a "legally protected interest in the outcome of the selection process." Similarly, the court in *Fortson v. Department of Navy*, EEOC Appeal No. 01873248, at *4 (February 10, 1988), maintains that a complainant fails to establish a prima facie case where he or she does not timely apply for the position in question. Here, not only did the Complainant fail to timely apply for the position in question, she failed to apply at all. As such, she is unable to establish a prima facie case of discrimination under the relevant controlling case law. Second, assuming arguendo that Complainant did establish a prima facie case of discrimination, there is no evidence in the record that supports the conclusion that Ms. Lang either intentionally concealed the vacancy announcement from Complainant or that she added the education requirement to prevent her from being considered for the position. Conclusory allegations unsupported by specific evidence are insufficient to establish a genuine issue of material fact and may not be relied upon to defeat summary judgment. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990); *see also Oxley v. Department of the Army*, EEOC Appeal No. 0120102652, at *3 (September 28, 2010) (the non-moving party "cannot avoid summary judgment resting on bare assertions, general denials, conclusory allegations, or mere suspicion"). Even looking at the facts in the light most favorable to the Complainant, there is simply no evidence here that indicates that she was denied fair consideration for the position of Contract Specialist on the basis of her age.

VI. Content of the Parties' Responses

When opposing summary judgment, a party must respond with *specific facts* showing that there is a genuine dispute as to a material fact and that the other party is not entitled to judgment as a matter of law. *Anderson*, 477 U.S. at 250.

The party opposing summary judgment may not rely on mere allegations, speculation, conclusory statements, or denials. The party should cite to specific evidence contained in the ROI that creates a factual dispute regarding a material issue in the case. If not already contained in the ROI, the party should also include any relevant documentary evidence or notarized/sworn-to witness statements, interrogatory answers, admissions, or other supporting materials and provide a clear and specific statement of their relevance. Any relevant documentary evidence not contained in the ROI are to be submitted as individual, numbered exhibits in PDF format. Evidence not properly labelled and formatted will not be considered. If a party believes that there are deficiencies within the ROI, the party should identify that information specifically as part of the Response to this Notice.

Reponses are to be uploaded to FedSEP in PDF format with a copy emailed to the AJ contemporaneously.

Where information is compiled from agency records, the party must provide a declaration from the person preparing the evidence as to the method used to prepare it.

UNLESS THE PARTY DEMONSTRATES THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT IN DISPUTE, NO HEARING WILL BE HELD IN THIS MATTER.

A party may also file an affidavit stating that the party cannot present facts to oppose summary judgment and give SPECIFIC REASONS to support this statement.

VII. Time for Responses

The regulations require the parties to submit a Response to the Notice within 15

CALENDAR days of this NOTICE ([redacted]). Each party must send a copy of the Response to the other party. If the parties have any general questions about this NOTICE, the party must contact the AJ by email immediately. Time deadlines will be strictly enforced.

Applicant Details

First Name	**Aaron**
Middle Initial	**M**
Last Name	**Jacobs**
Citizenship Status	**U. S. Citizen**
Email Address	**amj2194@columbia.edu**
Address	**Address** Street **417 W. 47th St. Apt. 6W** City **New York** State/Territory **New York** Zip **10036** Country **United States**
Contact Phone Number	**6105474961**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2017**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 15, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Human Rights Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**National Native American Law Student Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lloyd, Ed
elloyd@law.columbia.edu
212-854-4376

Barenberg, Mark
barenberg@law.columbia.edu
212-854-2260

Heller, Michael
mhelle@law.columbia.edu
212-854-9763

Underhill, Kristen
kunderhill@cornell.edu
(607) 255-5879

This applicant has certified that all data entered in this profile and any application documents are true and correct.

AARON JACOBS
417 W. 47th St. Apt. 6W
New York, NY 10036
(610) 547-4961
amj2194@columbia.edu

May 9, 2022

The Honorable Kenneth M. Karas
United States District Court
Southern District of New York
The Hon. Charles L. Brieant Jr.
Federal Building and United States Courthouse
300 Quarropas St.
White Plains, NY 10601-4150

Dear Judge Karas:

I am a third-year student at Columbia Law School, and I write to apply for a one-year clerkship in your chambers beginning in 2024.

After I graduate, I will begin my career as an Associate in the litigation practice at Kramer Levin Naftalis & Frankel LLP in New York City.

Enclosed please find a resume, law transcript, and writing sample. Also enclosed are letters of recommendation from Professors Michael Heller ((212) 854-9763, mhelle@law.columbia.edu), Kristen Underhill ((607) 255-5879, kunderhill@cornell.edu), Mark Barenberg ((212) 854-2260, barenberg@law.columbia.edu), and Edward Lloyd ((212) 854-4376, elloyd@law.columbia.edu).

Thank you for your consideration. Should you need any additional information, please do not hesitate to contact me.

Respectfully,

Aaron Jacobs

AARON JACOBS

417 W. 47th St. Apt. 6W, New York, NY 10036 · (610) 547-4961 · amj2194@columbia.edu

EDUCATION

Columbia Law School, New York, NY
J.D. expected May 2022
Honors: James Kent Scholar
Publications: *Distressed Drivers: Solving the New York City Taxi Medallion Debt Crisis*, 6 HRLR ONLINE 170 (2022)
Activities: *Columbia Human Rights Law Review*, 3L Online Editor, 2L Staff Editor
Research Assistant to Professor Mark Barenberg (Fall 2021)
American Civil Liberties Union, 2L Vice President of Events, 1L Representative
Student Animal Legal Defense Fund, 3L Representative, 2L Vice President, 1L Representative
Native American Law Students Association, 2L Treasurer
Environmental Law Society, 2L Board Representative
Native American Law Students Association National Moot Court Competition, 1L Competitor

University of Virginia, **Batten School of Leadership and Public Policy,** Charlottesville, VA
B.A., *graduated with highest distinction*, received May 2017
Majors: (1) Government and (2) Leadership & Public Policy
Activities: University Committee on Names and Renaming, Student Representative
Alpha Phi Omega Community Service Organization, Treasurer
Memorial Gymnasium, Facility Supervisor
Thesis: "The Structure of Machine Politics in Virginia, 1930-1965: An Analysis of Harry Byrd"

EXPERIENCE

Kramer Levin Naftalis & Frankel LLP, New York, NY
Summer Associate (return offer accepted) May – July 2021
Researched and drafted memoranda on issues relating to employment discrimination, bankruptcy, and tort claims. Assisted in due diligence for two real estate transactions. Contributed to a published article on recent changes in takings law. Successfully secured dismissal for a pro bono client in a matter regarding Child Protective Services.

Columbia Environmental Law Clinic, New York, NY
Student Attorney January – May 2021
Represented and liaised with two clients. Drafted and submitted comments to a state agency in opposition to an industrial polluter's permit application. Contributed to an *amicus brief* arguing for the importance of protecting clean water resources from toxic pollutants. Presented oral comments at a public hearing.

Brooklyn District Attorney's Office, Brooklyn, NY
Prosecution Extern September – December 2020
Drafted four motions to compel DNA from homicide and felony defendants. Wrote research memoranda about warrantless police searches and admissibility of an interrogation for a suppression hearing. Compiled information from 911 phone calls and transcribed defendant's recorded statements. Reviewed police investigation documents to compile three extensive witness lists. Interviewed witnesses and victims to discover case facts.

New York Legal Assistance Group, New York, NY
Foreclosure Prevention Project & Taxi Assistance Project Summer Legal Intern June – August 2020
Conducted over 15 intakes for clients regarding mortgage, taxi medallion, or COVID-19 related issues. Wrote research memoranda relating to a client's submission of a late answer, medallion loan security agreements, and due process considerations in remote proceedings. Reviewed foreclosure documents from clients.

INTERESTS: Playing trombone and piano, vegan cooking, re-watching *Seinfeld* and *The Office*

Columbia
Law School

Registration Services

law.columbia.edu/registration
435 West 116th Street, Box A-25
New York, NY 10027
T 212 854 2668
registrar@law.columbia.edu

CLS TRANSCRIPT (Unofficial)

02/04/2022 14:48:40

Program: Juris Doctor

Aaron Mayer Jacobs

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9325-1	Computers, Privacy and the Law	Moglen, Eben	2.0	
L6354-1	Drug Product Liability Litigation	Arnold, Keri; Grossi, Peter; O'Connor, Daphne	2.0	
L6252-1	Family Law	Godsoe, Cynthia	3.0	
L6655-2	Human Rights Law Review Editorial Board		1.0	
Y4350-1	PIANO INSTRUCTION:NON-MAJORS		0.0	
L9172-1	S. Advanced Trial Practice	Heatherly, Gail	3.0	

Total Registered Points: 11.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6231-1	Corporations	Judge, Kathryn	4.0	B+
L6655-2	Human Rights Law Review Editorial Board		1.0	CR
Y4350-1	PIANO INSTRUCTION:NON-MAJORS		0.0	A+
L6330-1	S. Native American Law [Minor Writing Credit - Earned]	Benally, Precious Danielle; McSloy, Steven	2.0	B+
L9175-1	S. Trial Practice	Heatherly, Gail	3.0	A
L6685-1	Serv-Unpaid Faculty Research Assistant	Barenberg, Mark	2.0	A

Total Registered Points: 12.0

Total Earned Points: 12.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L9257-1	Environmental Law Clinic	Lloyd, Edward	7.0	A
L6355-1	Health Law	Underhill, Kristen	4.0	A+
L6655-1	Human Rights Law Review		0.0	CR
L6274-3	Professional Responsibility	Gupta, Anjum	2.0	A
L6683-1	Supervised Research Paper	Barenberg, Mark	1.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-1	Evidence	Shechtman, Paul	3.0	B+
L6239-1	Ex. Criminal Prosecution: Manhattan/Bklyn DA	Hogg, Courtney; Weiner, Frances	2.0	A+
L6239-2	Ex. Criminal Prosecution: Manhattan/Bklyn DA - Fieldwork	Hogg, Courtney; Weiner, Frances	3.0	CR
L6655-1	Human Rights Law Review		0.0	CR
L6272-1	Land Use	Heller, Michael A.	3.0	A
L6675-1	Major Writing Credit	Barenberg, Mark	0.0	CR
L9563-1	S. Mental Health Law [Minor Writing Credit - Earned]	Levy, Robert	2.0	A-
L6683-1	Supervised Research Paper	Barenberg, Mark	2.0	A

Total Registered Points: 15.0

Total Earned Points: 15.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-1	Constitutional Law	Greene, Jamal	4.0	CR
L6108-2	Criminal Law	Teichman, Doron	3.0	CR
L6121-20	Legal Practice Workshop II	Kintz, JoAnn Lynn	1.0	CR
L6169-2	Legislation and Regulation	Johnson, Olatunde C.A.	4.0	CR
L6873-1	Nalsa Moot Court	Kintz, JoAnn Lynn; Strauss, Ilene	0.0	CR
L6116-1	Property	Scott, Elizabeth	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-6	Legal Methods II: Social Justice Advocacy	Franke, Katherine M.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-6	Civil Procedure	Sturm, Susan P.	4.0	B
L6105-1	Contracts	Kraus, Jody	4.0	B
L6113-3	Legal Methods	Bobbitt, Philip C.	1.0	CR
L6115-18	Legal Practice Workshop I	Berger, Dan; Whaley, Hunter	2.0	P
L6118-1	Torts	Rapaczynski, Andrzej	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 84.0
Total Earned JD Program Points: 73.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	34.0

ENVIRONMENTAL LAW CLINIC
MORNINGSIDE HEIGHTS LEGAL SERVICES, INC.
COLUMBIA UNIVERSITY SCHOOL OF LAW
435 WEST 116TH STREET • NEW YORK, NY 10027

TEL: 212-854-4291 FAX: 212-854-3554
ELLOYD@LAW.COLUMBIA.EDU

Re: Aaron Jacobs Clerkship Recommendation

Dear Judge:

I am writing to recommend Aaron Jacobs for a judicial clerkship in your chambers. I do so with great enthusiasm.

I have come to know Aaron through his work with me in the Columbia Environmental Law Clinic. The Clinic is a seven-credit course to which students dedicate twenty-one hours per week—half their course load. Aaron was a student in the Clinic in the Spring 2021 semester and received an A in the course. I have worked very closely with Aaron and have gotten to know him well.

I have been very impressed with Aaron's ability to quickly and comprehensively learn about new areas of the law. While in the Clinic, Aaron worked with a team of students to draft an amicus brief in support of the New Jersey Department of Environmental Protection's efforts to conduct direct oversight of a company that was discharging toxic PFAS compounds into the waters of the State. Aaron meticulously researched PFAS laws and regulations that are in effect in other states and countries so that the team could clearly understand how they compared to New Jersey's regulations. To do this, Aaron had to gain an understanding of technical and scientific concepts that relate to PFAS compounds and had to learn about broader frameworks within environmental law concerning water rights and regulations. His ability to grasp new legal concepts quickly would make him a successful clerk.

Aaron is an extremely dependable and effective communicator. While in the Clinic, Aaron also helped to draft comments to the New Jersey Department of Environmental Protection in opposition to a proposed permit modification by an industrial polluter. During the course of the semester, Aaron was in regular contact with our client and reported updates back to the Clinic team. When the Department of Environmental Protection held a public hearing about the proposed permit, Aaron stepped up and delivered a powerful oral statement that expressed concerns about the permit and the overburdened nature of the community in which the industrial plant operates.

On both projects, Aaron collaborated with teammates on numerous occasions, and also volunteered to help when other students were unavailable. One of our submission deadlines was right at the end of spring break. Aaron made himself available for a portion of that break to work with the team on final edits to the comments and to make sure that everything was going smoothly before the deadline. Over the course of the semester, I saw Aaron work with small teams to submit FOIA requests, coordinate informational meetings with community members, research caselaw and statutes, and write and edit lengthy documents. Because Aaron was so dependable, easy to work with, and his work quality was so high, his peers always enjoyed

collaborating with him. While he worked hard, Aaron was also quick to give credit to his teammates for the work they did, often openly acknowledging and complimenting the contributions of others.

I also had the chance to observe Aaron as a student in the seminar component of the Clinic. Aaron always came to class clearly having considered the materials in advance. He shared thoughtful insights about the readings with the class, and particularly expressed an interest in understanding environmental justice implications of policy decisions. He also submitted a number of written journals and other assignments for the seminar. Aaron is a strong writer who can effectively argue for any position.

This clerkship would be an excellent opportunity for Aaron and he would be a valuable asset in your chambers. Later in his career, Aaron hopes to work as an impact litigator for a nonprofit organization. By serving as a judicial clerk and learning about legal research, writing, and the entire litigation process, he'll obtain skills that will be invaluable in his career.

In addition to being a hard worker and reliable teammate, Aaron really cares about getting to know people. Before he began law school, Aaron worked as an AmeriCorps Member on a small team in Alabama, which he loved. Then, he worked on a close-knit political campaign, during which he worked with dozens of campaign volunteers, committee members, and constituents. During the Clinic, Aaron took seriously getting to know the clients and their goals as well as getting to know his teammates—which was not easy in a fully virtual semester. Aaron would be a great addition to any workplace team.

In sum, Aaron is a pleasure to work with and diligently applies himself to any task set before him. I strongly recommend Aaron for a judicial clerkship with you and would be happy to discuss his application further. I can be reached at 212-854-4291 or elloyd@law.columbia.edu.

Sincerely,

Edward Lloyd
Evan M. Frankel Clinical Professor of Environmental Law

May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

It's with great pleasure that I recommend Aaron Jacobs for your clerkship. I readily give him my highest possible recommendation.

As a 2L, Mr. Jacobs earned James Kent Honors – Columbia Law school's highest academic distinction, based solely on grades. He earned two A+'s, five A's, one A-, and one B+. That's stellar. But just as important as raw grades, Mr. Jacobs has proved himself to be an excellent researcher, legal writer, and team leader. And in the research and writing projects that he carried out under the close supervision of a professor, he's shown himself to be wonderfully responsive to editorial suggestions, and at the same time proactive in carrying out deep and comprehensive research.

I've gotten to know Mr. Jacobs especially in his faculty-supervised research and writing. I am the professor I referred to a moment ago. I supervised him in the research and writing of his Note for publication in a student journal. And I supervised him in his research and writing of several shorter memos when he served as my research assistant.

To be frank, while my research assistants are generally satisfactory at gathering materials for me, their research is not generally comprehensive and analytically reliable. That is, in most cases, I have to start from scratch to be sure they've covered the ground (although the material they've gathered is always helpful as a starting point). Mr. Jacobs is different. Our conversations and his memos make evident that he's systematically and comprehensively done the work, and that his excellent analytic capacities have taken him to the right places in the case law, statutes, regulations, and secondary literature.

He demonstrated the same qualities in his research and writing of the Note. The topic was one I know a lot about – the desperate plight of New York taxi drivers, who found themselves financially overwhelmed by falling fare revenue and unexpected debt loads. And the research of well-respected non-profit organizations, academics, and journalists documented that those financial burdens had severe effects on their physical and mental wellbeing. Mr. Jacobs spent the summer of 2020 working with the New York Legal Assistance Group doing factual and legal research on several issues related to the taxi drivers' situation. It was that experience, and Mr. Jacobs' more general commitment to helping others, that pointed him toward his Note topic. The result was fantastic. It's one of the best Notes I've supervised in the last ten years.

In other words, Mr. Jacobs sees what's happening in the world, reflects on it, and considers how he can devote his skills to helping ordinary people deal with the problems he's seen. He is committed to working with high-powered, effective lawyers doing work in the public interest. That's a big part of the reason he's applying for your clerkship. In one of his student organizations at Columbia, he was responsible to inviting public-interest lawyers to come and talk with students. He noticed that the ones who were most impressive in both their career paths and their legal acuity were those who had done excellent clerkships like yours. So, not only does he have the right talents, skills, and personality to give you what you need in your chambers, but he is a terrific person to get the benefit of the experience he will have there and to take that experience and use it in ways that benefit our profession and the public.

As I've mentioned, in my supervision of Mr. Jacobs, he was responsive to my guidance and, at the same time, was proactive and self-motivated – the perfect combination for a clerk working under your supervision and giving you what you need. He's also a cheerful, energetic young man, interested in many things outside the law, and therefore someone I always looked forward to meeting with. His team leadership bodes well for his interactions with you, his co-clerk, and other courthouse staff.

Again, I could not give him a higher recommendation. You won't go wrong by hiring him.

Sincerely,

Mark Barenberg

Sulzbacher Professor of Law
Columbia Law School
New York

Mark Barenberg - barenberg@law.columbia.edu - 212-854-2260

May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

Aaron Jacobs will make a superb judicial clerk. Given his combination of academic ability and easy-going manner, I am confident Aaron will excel in the most demanding chambers. He's a great guy, passionate about living a life of public service in the law. I recommend him with warmth, confidence, and no reservations. Aaron is a sure bet.

Aaron has achieved an excellent academic record at Columbia, after a bumpy first semester. This past year, he earned Kent honors, our equivalent of summa cum laude, reserved for the top rung of the class -- an exceptional level of academic accomplishment. He even earned A+ grades in two classes, a discretionary grade given to the single top student. Overall, Aaron's record demonstrates his smarts across a range of academic challenges. He has proven himself to have the academic ability to succeed at the highest levels.

I first got to know Aaron when he was a top student in my Land Use class, earning a solid A grade. He also stood out as one of the consistently best contributors in class discussion -- always prepared, always on point. I turned to him all the time for smart analysis. For example, Aaron asked insightful questions about the role that local governments play in shaping land use policies. We also spoke about his Note on taxi medallions in New York City.

When I asked Aaron about his eloquence and composure speaking in class, I learned that he has taken a leadership role across many student organizations at Columbia. He has served on the boards of the Columbia Law School ACLU, Student Animal Legal Defense Fund, Environmental Law Society, and Native American Law Students' Association. He is a team-oriented player and he's confident as a leader in front of a challenging room.

Aaron served as a staff editor in his 2L year, and Online Editor in 3L year, for the Columbia Human Rights Law Review, which is publishing his Note, entitled "Distressed Drivers: Solving the New York City Taxi Medallion Debt Crisis." During his 1L summer internship at the New York Legal Assistance Group, Aaron worked with taxi medallion owner-drivers who have struggled since Uber and Lyft entered the market. He builds on extensive interviews with taxi drivers and medallion owners, and suggests novel solutions that derive from a human rights perspective on the taxi crisis. Aaron's Note evidences his skills as a clear and concise writer, an ability that will serve him well as a clerk.

And he is always alert to the real-world consequences of the doctrinal nuances, for example, drawing on his AmeriCorps experience when discussing local politics in my Land Use course. After college in 2017, he spent a year working for AmeriCorps in Birmingham, Alabama, preparing and filing free tax returns for working families and senior citizens, coaching a debate team at a public Birmingham middle school, and conducting vision screenings for young children at daycares. He then spent the year before law school working as the Field Director for a congressional campaign, traveling to every corner of his rural district.

I am confident Aaron will do an excellent job for whoever is lucky enough to hire him. Aaron is open to divergent views and to careful, fair-minded consideration of the legal issues at stake. He has the temperament and ability to fit easily into the most intellectually-engaged chambers and to bring a high level of reliability and engagement to the job. Aaron will make a wonderful clerk. I would be pleased to discuss him further.

Sincerely,

Michael Heller

Michael Heller - mhelle@law.columbia.edu - 212-854-9763

May 09, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am very pleased to recommend Aaron Jacobs for a clerkship in your chambers. I got to know Aaron during my years working at Columbia Law School as an Associate Professor of Law. Aaron enrolled in my four-credit Health Law course during the spring of 2021. Aaron was an exceptional student in this work, and I was very pleased to give him the course's highest grade of A+, which we can only award to one student per class. Based on his classroom and exam performance, I have a strong positive impression of Aaron's writing, organizational skills, capacity to learn quickly and master new legal doctrine, and professionalism.

Aaron's classroom performance was exemplary, even though we were hampered throughout the course by Zoom. Aaron came to every class thoroughly prepared and ready to volunteer, and he was unfailingly accurate and thorough in his responses to cold-calling questions. Maintaining energy and focus during a 2-hour Zoom course is difficult without the in-person cues, and Aaron managed to convey consistently that he was engaged and curious about the material. Aaron volunteered frequently in classroom discussions, including engagement with the doctrinal materials as well as policy priorities and normative questions about how the law should allocate responsibility and costs for health harms. Aaron also asked thoughtful and insightful questions, approximately once per week, showing a capacity for critical thinking as well as professional engagement and awareness of others in the course. My course included several sample issue spotter problems and out-of-class practice opportunities, and Aaron completed these and brought his questions to office hours. He was an astute observer in issue spotters and has the capacity to see law from multiple perspectives, which will serve him well in the role of clerk.

Based on his classroom performance, I was delighted but not at all surprised to see Aaron's outstanding work on the final exam. The exam was a 4-hour scheduled test, divided into a very demanding issue spotter and several policy questions drawing on materials throughout the course. I have high expectations for students in both issue spotter and policy questions, and I require case citations and integration of other class materials in all responses. Aaron met these challenges with resounding success. He had the third highest issue spotter score (in a class of 51), identifying and accurately resolving 10-15 more issues compared to the next highest scorer. Aaron was particularly dextrous in his statutory analyses drawing on EMTALA, the False Claims Act, and ERISA, where he navigated some tricky issues of federal pre-emption and regulatory minutiae. He was also skilled in identifying and using common-law concepts in medical malpractice and informed consent law.

Aaron's greatest exam strength, however, was in his policy question responses. Aaron's prose was well-organized and persuasive, with clear arguments and consideration of competing claims. His writing was clear and packed with relevant details, and he mobilized materials from every area of the course in his essays. Aaron chose to write about variation in health care costs for COVID tests at different facilities, as well as an essay on causes and legal responses to maternal mortality. His answers showed adeptness in working simultaneously with multiple types of law (federal statutes, state statutes, Constitutional law, tort law), as well as a ready ability to use what he had learned in a new factual context. These are important skills in a clerk, and it gives me confidence that he will be a very positive addition to chambers.

I am pleased to recommend Aaron for your consideration. Although my interactions with Aaron were entirely by Zoom, I believe I have a good sense of his skills, and I think he will be a proficient, thoughtful, and reliable clerk. Please let me know if I can provide any other information that may be helpful.

Sincerely,

Kristen Underhill
Professor of Law
Cornell Law School

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AARON JACOBS
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This writing sample is a midterm examination that I submitted during my Drug Product Liability Litigation course in the Spring 2022 semester. It is written as a bench memo.

The assignment was limited to legal analysis and a recommendation section. To summarize the facts, the plaintiff in this case, Thomas Brady, was administered a 10 mg dosage of the anesthetic drug NapTime, produced by the defendant corporation, Pharmco. This dosage severely injured Mr. Brady and left him permanently disabled. Before the FDA had approved NapTime, clinical trials showed that a 10-15 mg dosage would provide sufficient sedation for patients without causing injury. In 2016, the FDA approved the drug and a label that recommended a 10-15 mg dosage. Soon after approval, Pharmco received reports that some patients were injured by a 10-15 mg dosage of NapTime. In 2017, Pharmco filed a submission to the FDA to modify the dosage recommendation on the label to a 3-5 mg dosage. The FDA denied this submission due to a lack of evidence. Pharmco then began a new clinical trial, the Hamilton study, that confirmed the 3-5 mg dosage. In November 2018, Pharmco submitted these results to the FDA and the FDA approved the label change. Mr. Brady was injured by NapTime in October 2018.

Mr. Brady has alleged a claim for negligence in state court against Pharmco for failing to warn that the 3-5 mg dose was more appropriate. Pharmco has moved for summary judgment on the grounds that the FDA's 2017 denial of the label change made it impossible for Pharmco to have made that label change prior to the time it did and still comply with federal law.

1. **Pharmco's Arguments**

    a. **It Was Impossible for Pharmco to Follow Both its State-Law Duty to Warn and Federal Law**

Pharmco will cite to the *Levine* holding: "absent clear evidence that the FDA would not have approved a change to [the] label, we will not conclude that it was impossible for [the drug company] to comply with both federal and state requirements."[1] Pharmco will assert that there was clear evidence that the FDA would not approve this label change because on April 28, 2018, the FDA already had rejected the proposed label change. Therefore, it was impossible for Pharmco to both fulfill state-law duties and abide by federal law.

By October 1, 2018, the date of Brady's injury, only approximately five months had passed since the FDA denied Pharmco's submission. While Pharmco conducted a new study (the Hamilton study), those final results were not ready until November 1, 2018, a month after Brady's injury. The only other additional data that the FDA received during this period were adverse event reports from patients who were over-sedated after following the initial label suggestion of 10-15 mg. While the facts do not distinguish exactly how many of these adverse events were reported after April 28 and before October 1, the number was relatively low given only 200 reported adverse incidents out of approximately one million doses by December 1. Because the FDA had essentially no additional data that pointed to a problem with the 10-15 mg dosage, and none of that data came from a clinical trial (as advised by 21 C.F.R. §314.125(b) and 21 C.F.R. §314.126)[2] before Brady's injury, Pharmco will argue that there is clear evidence that the FDA would not have approved this label change.

[1] Wyeth v. Levine, 555 U.S. 555, 571 (2009).
[2] 21 C.F.R. §§ 314.125(b), 314.126 (2022).

Pharmco will assert that this meets the "clear evidence" standard as defined by the *Albrecht* Court. The Court held that clear evidence "is evidence that shows . . . that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning."[3] Pharmco will argue that these obligations were met. From September 2017 to March 2018, Pharmco submitted all adverse event reports to the FDA. On April 1, 2018, Dr. White submitted a complete justification for a warning change to the FDA, based upon adverse event reports and an Ask-the-Doctor Corporation questionnaire. In response, On April 28, 2018, the FDA informed Pharmco that it would not approve a change to the drug's label. Because Pharmco fully informed the FDA and the FDA rejected the change, this meets the clear evidence threshold, which in turn "pre-empts a claim, grounded in state law, that a drug manufacturer failed to warn consumers of the . . . risks associated with using the drug."[4]

Because they believe there is clear evidence that the FDA would not have approved the label change prior to Brady's injury, Pharmco will argue that it was impossible to follow state and federal laws simultaneously.

b. There Was Nothing Else Pharmco Could Have Done to Avoid the Direct Conflict

First, *Bartlett* indicates that "an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability."[5] In order to avoid impossibility, Pharmco will claim it was not a viable suggestion to simply stop selling NapTime in this state after FDA denied the label change. In fact, the *Bartlett* Court even stated

[3] Merck Sharpe & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1672 (2019).
[4] *Id.*
[5] Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 488 (2013).

"adopting the . . . stop-selling rationale would render impossibility pre-emption a dead letter. . . ."[6]

Pharmco will also argue that the "changes being effected" (CBE) process would not have permitted a label change to avoid the direct conflict either. This process is defined at 21 C.F.R. §314.70.[7] Pharmco will assert that even if it attempted to change the label through the CBE process, the FDA would have rejected such an effort. The consequences of such a rejection are not trivial for Pharmco. If the FDA were to reject the CBE application, which seemed certain given the dearth of new clinical data before November 1, 2018, "[the FDA] may [have] order[ed] the manufacturer to cease distribution of the drug product(s)."[8] Advancing with a label change despite FDA opposition could be a costly error for Pharmco.

Prior to November 1, when the Hamilton study results were finalized, Pharmco will argue it would have been improper for them to make any additional changes. Before that time, there were no adequate and well-controlled studies showing that 3-5 mg was a safer dosage. Without this substantial evidence of adequate and well-controlled studies, the FDA would have refused an application for a change.[9] It would have been improper for Pharmco to have used the CBE process prior to the Hamilton study's findings, because there were not controlled studies demonstrating the efficacy of a 3-5 mg dose.

c. Even if the Court Does Not Find a Direct Conflict, Then the State Claim Should Still Be Preempted

Even if this court does not believe there is a direct conflict, Pharmco will argue that the state claim should be preempted because recognition of the state tort action creates a barrier to

[6] *Id.* at 475.
[7] 21 C.F.R. § 314.70 (2022).
[8] 21 C.F.R. § 314.70(c)(7) (2022).
[9] 21 C.F.R. § 314.125(b)(5) (2022).

the successful accomplishment of the full purposes of Congress. The FDCA has made clear that drug companies should not unilaterally implement changes that the FDA has rejected. For example, a drug is deemed to be misbranded if its label is false or misleading.[10] Given that there was no clinical evidence to support the 3-5 mg dosage until November 1, 2018, a month after Brady's injury, allowing this claim (or requiring that Pharmco have changed the label) runs counter to congressional intent. If Pharmco had implemented a label change despite FDA's denial, NapTime could have been labeled as misbranded and then been seized.[11] Congress was so insistent in the FDCA that drug companies not make unilateral label changes that are not supported by clinical data, that it threatened serious consequences for drug companies who do so. Pharmco will claim that allowing a state tort claim to proceed here clearly undermines congressional purpose.

d. The Supremacy Clause and Policy

The Supremacy Clause "makes federal law 'the supreme Law of the Land' even absent an express statement by Congress."[12] The Clause offers certainty—those who are following federal laws that conflict with state laws need follow the federal law and will not be liable for state torts. Pharmco will argue that their company and other drug companies will not want to continue developing and distributing drugs that have potential adverse effects, despite immense benefits, if these companies can be sued by a plaintiff in state court even though they did everything right. Pharmco will reason that they shared all data with the FDA in a timely manner and abided by all FDA decisions. If their burden is higher than that, Pharmco may not want to

[10] 21 U.S.C. § 352.
[11] 21 U.S.C. §§ 331, 334.
[12] PLIVA Inc. v. Mensing, 564 U.S. 604, 621 (2011).

introduce new drugs and expose itself to state-tort liability, which hurts individuals across society who would receive benefits from new drugs.

2. **Brady's Arguments**

a. There Was No Direct Conflict Between State Duties to Warn and Federal Law

Brady will argue that it was not impossible for Pharmco to meet its state law duties and to follow federal law. Without impossibility, there is no preemption. Section 202 of the 1962 Amendments to the FDCA explicitly states "no provision . . . shall be construed as . . . intent on the part of the Congress to occupy the field . . . of any State law on the same subject matter, unless there is a *direct and positive conflict between such provision . . . and such State law so that the two cannot be reconciled*.[13] Because Pharmco had other options to fulfill its state-law duty without violating federal law, there was not impossibility.

i. **Pharmco Could Have Ceased Sales of NapTime in the State**

First, Brady will argue that after the FDA rejected the labeling change on April 28, 2018, Pharmco could have ceased sales of NapTime in this state. Therefore, it was not impossible for Pharmco to follow both state and federal laws. While *Bartlett* may seem to suggest that the "stop-selling rationale" does not alleviate impossibility for a drug company, the company in that case, Mutual Pharmaceutical, was a generic maker.[14] Here, Pharmco is not—it is instead a brand manufacturer. The Court has not yet ruled on whether this *Bartlett* holding should extend to brand manufacturers. Brady will argue that generic and brand manufacturers have distinct purposes, and these distinctions support not extending the *Bartlett* holding to brand manufacturers. Generic drugs are offered to consumers in large part because they save 75-80%

[13] Federal Drug and Cosmetic Act, 76 Stat. 780, 793 (1962) (current version at 21 U.S.C. § 301) (emphasis added).

[14] Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 475 (2013).

of drug costs. The "stop-selling rationale" cannot apply to generic manufacturers because if it did, and generic drugs left markets when manufacturers feared state liability, drug prices would soar.

Additionally, generic manufacturers do not have the ability to unilaterally alter drug labels—only brand manufacturers can do this.[15] For brand manufacturers though, the "stop-selling rationale" should apply as a way to avoid impossibility because they do have the ability to unilaterally change drug labels and do not have the purpose of cutting drug costs for consumers. If a company like Pharmco chooses not to change a label, even though unlike a generic manufacturer, they can unilaterally do so through the "changes-being-effected" process, then they would retain the option to leave the jurisdiction, meaning that it is not impossible to abide by both state and federal law.

ii. **There Was No Clear Evidence that the FDA Would Deny a Label Change**

Brady will then point to the standards laid out in *Levine* and *Albrecht* to support this assertion. *Levine* holds that "absent clear evidence that the FDA would not have approved a change to [the] label, we will not conclude that it was impossible for [the drug company] to comply with both federal and state requirements."[16] *Albrecht* clarified that "clear evidence is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA . . . informed the drug manufacturer that the FDA would not approve a change . . . ."[17] Brady will argue that by October 1, 2018, the date of Brady's injury, this standard was not met.

[15] *Mensing*, 564 U.S. at 624.
[16] Wyeth v. Levine, 555 U.S. 555, 571 (2009).
[17] Merck Sharpe & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1672 (2019).

By the Summer of 2018, Pharmco had preliminary information from the Hamilton study that most patients were adequately sedated at the 3-5 mg level. However, these observations were not finalized or shared with the FDA until November 3, 2018. Brady will argue that because the FDA did not have access to all available information by the date of Brady's injury, there is not clear evidence that the FDA would not have approved the change to the label.

iii. Pharmco Could Have Used the Changes-Being-Effected Process to Clarify Dosage Information and Strengthen Warnings

Although *Mensing* indicates that the "changes-being-effected" (CBE) process is not available for generic manufacturers, it is available for brand drug manufacturers like Pharmco.[18] The *Albrecht* Court held that "the CBE regulation permits changes, so a drug manufacturer will not ordinarily be able to show there is an actual conflict . . . ."[19] Brady will argue that this CBE process allowed Pharmco to add a stronger warning, remove misinformation, and clarify dosage information despite the FDA's rejection of the proposed label change on April 28, 2018.[20] In fact, regulations require that "the labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with the drug; a causal relationship need not have been proved."[21]

While Pharmco could have only utilized the CBE process if it acquired new information, the *Levine* Court clarified that this "is not limited to new data, but also encompasses 'new analyses of previously submitted data.'"[22] Here, Brady will argue that Pharmco, like Wyeth in *Levine*, had the opportunity to reanalyze the numerous adverse event reports that occurred prior to his injury. Furthermore, Pharmco did have new data, even if it was not in final form.

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[18] *Mensing*, 564 U.S. at 624.
[19] *Albrecht*, 139 S. Ct at 1679.
[20] 21 C.F.R. § 314.70(c)(6)(iii)(A)-(D) (2022).
[21] 21 C.F.R. § 201.80.
[22] Wyeth v. Levine, 555 U.S. 555, 569 (2009).

Throughout the summer of 2018, the Hamilton study revealed that the 3-5 mg threshold was usually the appropriate amount for sedation. Pharmco had the opportunity to use the CBE process to describe the 3-5 mg level and the importance of slow administration and individualization of dosage, but it chose not to do so.

b. The Importance of State Tort Suits in the Drug Product Liability Context

Brady will argue that preempting a state tort suit like this one will harm him and many others who suffer terrible injuries from drugs because of insufficient labeling. States have an interest in ensuring there is a mechanism in place for its citizens to recover financially. But if Brady and other individuals in his position are unable to obtain relief through state courts, where else can they turn? Limiting the ability for a state's citizens to recover for injuries through a state court places undue financial burdens on individuals and families who might now face serious debt loads from medical expenses and loss of income due to death or permanent disability.

Additionally, "state tort law will sometimes help the FDA 'uncover unknown drug hazards and [encourage] drug manufacturers to disclose safety risks.'"[23] Preventing Brady's state claim from going forward will limit proper FDA monitoring in the future and grant drug manufacturers space to hide potential safety risks. This can have deadly consequences for consumers.

3. **Recommendation: Deny Pharmco's Motion for Summary Judgment**

I recommend denying Pharmco's motion because the changes-being-effected process likely permitted Pharmco to change its label despite the April 28 rejection from the FDA. Congressional intent and the policy consequences of preempting state-law tort suits in the drug product liability context also weigh against the motion.

[23] *Levine*, 555 U.S. at 579.

a. **While Pharmco's Options Were Limited, There Was Not a Direct Conflict Between Federal and State Law**

First, Pharmco has the stronger argument that stopping sales of NapTime in this state is not a viable way to avoid a direct conflict and impossibility. While the *Bartlett* holding is for a generic drug manufacturer,[24] suggesting that brand manufacturers should stop selling in a jurisdiction to avoid tort liability is also damaging to society, as it would eliminate drugs with immense benefits from certain states until adverse effects are fully determined, years or decades later.

Pharmco also has the stronger argument that there was clear evidence that the FDA would reject a label change. Only approximately five months passed between the April 28 FDA rejection and the plaintiff's injury. It is unlikely that the FDA would have a dramatically different opinion in such a short period, particularly because no new clinical data was released to the FDA until November 3 via the Hamilton study. To confirm this point, I suggest asking at oral argument about exactly how many adverse event reports were submitted to Pharmco by September 2018.

However, the plaintiff only needs to show one way for Pharmco to avoid a direct conflict that would lead to preemption. Brady has the better argument that the CBE process was a possible solution for Pharmco. By the summer, Pharmco had acquired new information as defined by *Levine* that would permit it to utilize the CBE process. It had additional adverse event reports and preliminary data from the ongoing Hamilton study. Therefore, despite the FDA's April 28 label change rejection, Pharmco could have used the CBE process over the summer to indicate the importance of slow and individualized dosages and to recommend a 3-5 mg threshold for NapTime.

[24] Mut. Pharm. Co. v. Bartlett, 570 U.S. 472, 475 (2013).

Justice Thomas' concurring opinion in *Albrecht* holds that Merck was able to submit a label change via the CBE process. "But neither agency musings nor hypothetical future rejections constitute pre-emptive 'Laws' under the Supremacy Clause."[25] The same is true here. Pharmco could have used the CBE process to change the NapTime label, so its preemption argument should fail.

b. Congress Intended for State Law to Operate Here

Because there is no direct conflict between federal and state law duties for Pharmco, Pharmco will also suggest that congressional intent indicates that Brady's state claim should be preempted. But congressional intent in this realm is actually quite straightforward: Section 202 of the 1962 FDCA Amendments states that Congress has no intent to exclude State law unless there is a direct conflict.[26] On top of that, Congress declared that mislabeled drugs are deemed misbranded and should be seized.[27] Congress did not want to permit mislabeled drugs to remain available to consumers and empowered states to enforce these aims through tort law.

c. State Tort Suits Play an Essential Role for Consumers and States

If consumers like Brady cannot recover for their injuries in this type of case, then these individuals have to personally bear a large financial burden. Brady is now permanently disabled with significant anoxic brain damage. Because of his disability, he may not be able to earn income and his medical bills are likely large. State tort claims allow individuals like Brady to be made financially whole. If this state tort claim is preempted, the state itself may have to bear additional expenses while it supplies public assistance and other resources to its citizen, Brady.

[25] Merck Sharpe & Dohme Corp v. Albrecht, 139 S. Ct. 1668, 1682 (2019) (Thomas, J., concurring).
[26] Federal Drug and Cosmetic Act, 76 Stat. 780, 793 (1962) (current version at 21 U.S.C. § 301).
[27] 21 U.S.C. §§ 334(a)(1), 352(a).

Drug companies like Pharmco may be hesitant to introduce new drugs if they can still be subject to state tort liability despite abiding by most FDA stipulations. However, rather than preempting state tort claims, regulators should strive to offer clear instructions to drug companies on how to avoid direct conflicts. It is easier for Pharmco and drug companies to handle this burden than it is for Brady and other similarly situated plaintiffs to have no financial restitution.

Applicant Details

First Name	**Matthew**
Last Name	**Kountz**
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Address	**Address** **Street** **1 Market St., 268** **City** **CAMDEN** **State/Territory** **New Jersey** **Zip** **08102** **Country** **United States**
Contact Phone Number	**8569794383**

Applicant Education

BA/BS From	**Purdue University**
Date of BA/BS	**December 2016**
JD/LLB From	**Rutgers University School of Law--Camden** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=23101&yr=2011**
Date of JD/LLB	**May 10, 2021**
Class Rank	**School does not rank**
Law Review/ Journal	**Yes**
Journal(s)	**Rutgers Journal of Law and Religion**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Professional Organization

Organizations	**Just The Beginning Foundation**

Recommenders

Ricks, Sarah E.
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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May 11, 2022

Honorable Kenneth M. Karas, U.S.D.J.
United States District Court for the Southern District of New York
The Hon. Charles L. Brieant Jr., Federal Building United States Courthouse
300 Quarropas Street,
White Plains, New York 10601

Dear Judge Karas,

I am currently a law clerk for the New Jersey Superior Court, Criminal Division, for the 2021-2022 term and a recent graduate of Rutgers Law School. I have accepted an offer to clerk for Judge Sharon King, U.S.M.J., with the District of New Jersey for 2022-2023. I am writing to express my interest in a clerkship in your chambers for the 2024-2025 term.

As a law clerk, I am continuing my pursuit to be the absolute best legal researcher and writer that I can be. As a law student, I took every opportunity to improve my legal research and writing skills, which is why I sought internships offering substantial opportunities to refine them. To further improve my writing, I served as an editor of the Rutgers Journal of Law and Religion. Through my work with the District of New Jersey's Staff Attorney's (Pro Se) Office, as well as working in the chambers of the Hon. Michael A. Shipp, U.S.D.J., I have become comfortable writing at the federal level. I have written Habeas Corpus petitions along with other opinions and memorandum. In my final semester, I served as a judicial extern to the Hon. Barry T. Albin of the Supreme Court of New Jersey. These judicial opportunities, as well as others, have exposed me to several key areas of litigation, advocacy, research, writing and case preparation.

In my role as a judicial intern with Judges Kramer and Shipp, as well with Justice Albin, I learned first-hand that clerks need to be thorough and accurate when completing their duties to help ensure the success of chambers. As an intern with the Pro Se Office with the District of New Jersey, I wrote for several judges of the District and learned how to adapt my writing style to best fit that of the author. I am currently using those skills to benefit chambers now and will use them to benefit chambers in the future. I believe that I can be of service to your chambers, as I will be able to implement the training and experience I have gained from working within several chambers. These experiences have help me successfully transition from intern to law clerk with Judge Kramer, whom I first worked with as a judicial intern after completing my first year of law school and will continue into my clerkship with Judge King.

As a law clerk, I understand the requirements for the success of chambers are not limited to research and writing, but also extend to administrative duties and being a team player with a positive attitude. With this training, I will be a successful law clerk at the District court level. Enclosed please find my resumé for your review. Thank you for consideration.

Respectfully,

Matthew Kountz

Matthew Kountz

(856)979-4383 • Matthewskountz@gmail.com • 1 Market St., Apt 268 Camden, NJ 08102

Education

Rutgers Law School Camden, NJ
Juris Doctor, May 2021
Honors: Fall 2020 Dean's List Honors - Term GPA: 3.76
Activities: Staff Editor: Rutgers Journal of Law and Religion
Hon. Judith Wizmur Bankruptcy Pro Bono Project, Fall 2020
Black Law Students Association (BLSA) Secretary, Fall 2019-Spring 2020
Rutgers Law School Domestic Violence Project, Spring 2019

Purdue University West Lafayette, IN
Bachelor of Science in Economics, December 2016

Clerkships

The Honorable Sharon King, U.S.M.J., U.S. District Court for the District of New Jersey Camden, NJ
Law Clerk, 2022-2023
The Honorable Kurt Kramer, J.S.C., Camden County Superior Court Camden, NJ
Law Clerk, 2021-2022

- Draft bench memorandums in preparation for motions and trials.
- Supervise the internship program within chambers.
- Perform administrative tasks for the operation of chambers.

Internships

The Honorable Barry T. Albin, J., Supreme Court of New Jersey Somerville, NJ
Judicial Extern, Spring 2021

- Assist law clerks with research and writing assignments.
- Review petitions for certification to the Supreme Court of New Jersey.

Urban Promise High School Camden, NJ
Marshall-Brennan Constitutional Literacy Project Teaching Fellow, Spring 2021

- Taught high school seniors different aspects of the Constitution and Constitutional law three days a week.
- Coordinated with classroom teacher to discuss lesson plans involving current Constitutional issues.

Capehart & Scatchard, P.A. Mt. Laurel, NJ
Summer Associate, Summer 2020 – Nov. 2020

- Prepared internal memos for various areas of law including education and employment law.

Professor Sarah Ricks, Rutgers Law School Camden, NJ
Graduate Assistant, Spring 2020

- Proofread *Current Issues in Constitutional Litigation: A context and Casebook Third Edition*.

Staff Attorney's (Pro Se Litigant) Office for the District of New Jersey Trenton, NJ
Legal Extern, Spring 2020

- Drafted opinions on Habeas Corpus petitions pursuant to 28 U.S.C. § 2254.
- Screened and reviewed *pro se* prisoner complaints and petitions.
- Assisted staff clerks in researching, drafting, and editing opinions and memos.

The Honorable Michael A. Shipp, U.S.D.J., U.S. District Court for the District of New Jersey Trenton, NJ
Judicial Extern, Fall 2019
The Honorable Kurt Kramer, J.S.C., Camden County Superior Court Camden, NJ
Judicial Intern, Summer 2019

Interests

- Enthusiastic pool and billiards player.
- Swimming.

RECORD OF: MATTHEW S KOUNTZ

STUDENT NUMBER: 146001039

RECORD DATE: 06/15/21 PAGE: 1

Fall 2018 RUTGERS LAW SCHOOL

PROGRAM: LAW
Degree Sought: JURIS DOCTORATE

TITLE	SCH	DEPT	CRS	SUP SEC	CRED	PR	GRADE
CIVIL PROCEDURE	24	601	501	01	4.0		B-
CONTRACTS	24	601	511	01	4.0		B
LAWR I	24	601	530	01	2.5		B-
TORTS	24	601	541	02	4.0		B
TOTAL CREDITS ATTEMPTED:					14.5		

DEGREE CREDITS EARNED: 14.5 TERM AVG: 2.852 CUMULATIVE AVG: 2.852

Spring 2019 RUTGERS LAW SCHOOL

PROGRAM: LAW
Degree Sought: JURIS DOCTORATE

TITLE	SCH	DEPT	CRS	SUP SEC	CRED	PR	GRADE
CONSTITUTIONAL LAW	24	601	506	02	4.0		B
CRIMINAL LAW	24	601	516	01	4.0		B+
PROPERTY	24	601	536	02	4.0		B+
LAWR II	24	601	550	01	2.5		B
TOTAL CREDITS ATTEMPTED:					14.5		

DEGREE CREDITS EARNED: 29.0 TERM AVG: 3.182 CUMULATIVE AVG: 3.017

Summer 2019 RUTGERS LAW SCHOOL

PROGRAM: LAW
Degree Sought: JURIS DOCTORATE

TITLE	SCH	DEPT	CRS	SUP SEC	CRED	PR	GRADE
PROFESS RESPONSIB	24	601	582	L1	2.0		B
TOTAL CREDITS ATTEMPTED:					2.0		

DEGREE CREDITS EARNED: 31.0 TERM AVG: 3.000 CUMULATIVE AVG: 3.016

Fall 2019 RUTGERS LAW SCHOOL

PROGRAM: LAW
Degree Sought: JURIS DOCTORATE

TITLE	SCH	DEPT	CRS	SUP SEC	CRED	PR	GRADE
POLICE & THE PEOPLE	24	601	581	11	2.0		B+
EVIDENCE	24	601	691	01	4.0		A-
CHILDRN/PARENTS/LAW	24	601	706	01	3.0		A-
INTELL PROP: CUR IS	24	601	728	01	2.0		B+
JUDICIAL EXTERNSHIP	24	601	790	01	3.0	P	PA
TOTAL CREDITS ATTEMPTED:					14.0		

DEGREE CREDITS EARNED: 45.0 TERM AVG: 3.546 CUMULATIVE AVG: 3.155

** CONTINUED ON NEXT PAGE **

RECORD OF: MATTHEW S KOUNTZ

STUDENT NUMBER: 146001039

RECORD DATE: 06/15/21 PAGE: 2

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
Spring 2020 RUTGERS LAW SCHOOL								
PROGRAM: LAW								
Degree Sought: JURIS DOCTORATE								
CIV RIG LIT -CUR ISS	24	601	526		01	3.0		PA
TRIAL ADVOCACY	24	601	651		11	3.0		PA
CRIM PRO-INVST PROCS	24	601	655		01	3.0		PA
PRIV LAW ESSENTIALS	24	601	787		11	2.0		PA
PRACTICE EXTERNSHIP	24	601	795		01	2.0	P	PA
TOTAL CREDITS ATTEMPTED:						13.0		
DEGREE CREDITS EARNED: 58.0 TERM AVG: CUMULATIVE AVG: 3.155								
COMMENTS:								
Rutgers Law School adopted a mandatory pass/no credit								
(PASS/NOCR) for all courses this term as a result of COVID-19								
and related university transitions.								

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE
Fall 2020 RUTGERS LAW SCHOOL								
PROGRAM: LAW								
DEANS LIST								
ADV LEGAL RESEARCH	24	601	522		01	2.0		A-
PRETRIAL ADVOCACY	24	601	597		11	4.0		A-
ESTATES AND TRUSTS	24	601	627		11	3.0		PA
PLEA BARGAINING	24	601	679		01	3.0		A
JRNL LAW & RELIGION	24	601	774		01	0.5	P	PA
MARSHALL BRENNAN FE	24	601	782		01	2.0		A-
MARSHALL BRENNAN LAB	24	601	799		01	1.0	P	PA
TOTAL CREDITS ATTEMPTED:						15.5		
DEGREE CREDITS EARNED: 73.5 TERM AVG: 3.760 CUMULATIVE AVG: 3.281								
Spring 2021 RUTGERS LAW SCHOOL								
PROGRAM: LAW								
Degree Sought: JURIS DOCTORATE								
CON LAW:PWRS OF PRES	23	600	644		01	2.0		B+
CRIM PRE-TRIAL PRACT	23	600	702		01	2.0		A-
FUND OF LEG ANALYSIS	24	601	512		11	4.0		B+
POLICE, PRISONS & PR	24	601	615		01	2.0		A
JRNL LAW & RELIGION	24	601	774		01	0.5	P	PA
MARSHALL BRENNAN FEL	24	601	784		01	3.0	P	PA
TOTAL CREDITS ATTEMPTED:						13.5		
DEGREE CREDITS EARNED: 87.0 TERM AVG: 3.532 CUMULATIVE AVG: 3.320								

DEGREE: JURIS DOCTOR MAY 2021

** CONTINUED ON NEXT PAGE **

RECORD OF: MATTHEW S KOUNTZ

STUDENT NUMBER: 146001039

RECORD DATE: 06/15/21 PAGE: 3

TITLE	SCH	DEPT	CRS	SUP	SEC	CRED	PR	GRADE

PROGRAM: LAW

Last Term Information

LAST TERM CREDIT HOURS:	13.5
LAST TERM CREDITS IN GPA:	10.0
LAST TERM POINTS IN GPA:	35.3
LAST TERM CUMULATIVE CREDITS IN GPA:	63.0
LAST TERM CUMULATIVE POINTS IN GPA:	209.2

***** END OF TRANSCRIPT *****

May 11, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I recommend Matthew Kountz for a federal judicial clerkship for 2022-23. As a former federal law clerk, I can confidently predict that Matthew is likely to succeed in the role.

From 2021-22, Matthew will clerk for a New Jersey trial court, the Honorable Kurt Kramer. In fact, Judge Kramer re-hired Matthew after his successful summer internship in the Judge's chambers in 2019. In addition to that exposure to the work of a judicial law clerk, Matthew externed in Spring 2021 for the Honorable Barry Albin of the New Jersey Supreme Court. Further, Matthew has two different experiences with the work of federal courts. He externed in Fall 2019 for the Honorable Michael Shipp of the U.S. District Court for the District of New Jersey. In addition, he externed in Spring 2020 in the federal court office responsible for pro se litigants.

During the entirety of his 2L year, I worked closely with Matthew in the Marshall Brennan Constitutional Literacy Fellowship. The law student Fellows spend the first semester learning federal constitutional law and practicing teaching techniques. The Fellows spend the second semester teaching high school students in Camden, New Jersey. Matthew taught his high school students remotely, via Zoom. His classes focused on First, Fourth, and Fourteenth Amendment constitutional rights of juveniles. We chose Matthew in a competitive process to be a Constitutional Literacy Fellow. Matthew rewarded our confidence.

I first met Matthew as a student in my course Current Issues in Civil Rights Litigation. The course integrates the teaching of law practice skills with the teaching of federal constitutional law and 42 U.S.C. §1983 doctrine. The class focuses on Fourth, Eighth, and Fourteenth Amendment litigation and on Section 1983 defenses. Matthew's insightful comments first brought him to my attention.

The Civil Rights Litigation course is structured around 10 law practice simulations that require students to step into realistic attorney roles, such as counseling a client on the next step in litigation, negotiating a settlement, or conferencing with a trial court judge on how to charge the jury. Matthew's performance in two complex law practice simulations evidenced a nuanced understanding of the constitutional and statutory doctrines. Despite the COVID-caused abrupt switch to online classes, Matthew remained an engaged and thoughtful participant. No grades were assigned as Rutgers mandated Pass/Fail grading.

I would be delighted to speak with you further about Matthew Kountz's application.

Sincerely,

Sarah E. Ricks
Distinguished Clinical Professor of Law

Sarah E. Ricks - sricks@camden.rutgers.edu - (856) 225-6419

May 11, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am writing to enthusiastically recommend Matthew Kountz for a clerkship in your chambers. Matthew was a student in my class, Plea Bargaining, in the fall semester of 2020. He earned the highest score in the class. I also got to know Matthew while advising him as he wrote his Note for the Rutgers Journal of Law and Religion. I have been incredibly impressed by Matthew's thoughtfulness, strong writing skills and engagement with the law. I know he will make a terrific clerk and lawyer.

In my Plea Bargaining class students do two things: they learn the law and policy that controls plea practice and then they put that knowledge to use through mock negotiations in several plea bargain simulations. Matthew was exceptional in both areas. Matthew participated in every single class. He always prepared thoroughly for class, both having done the reading and thought deeply about the issues within the materials. Matthew is a natural leader and during a difficult semester, where all learning was virtual, it was helpful to have Matthew in the class. He was skilled at asking tough questions and taking the lead in class discussions. In addition, Matthew excelled in the skills portion of the class. He prepared for his negotiations using the skills we learned in class and clearly understood the power dynamics at play in each negotiation whether he was assigned to be a defense attorney or a prosecutor.

In addition, Matthew is a beautiful writer. His memos for my class were thoroughly researched, clearly structured and well-written. He also impressed me with his writing skills as I advised him on his Note. Matthew's strong writing skills and clear leadership in the classroom make him one of the most effective communicators I have encountered in my law school classes. These skills will make him an excellent lawyer and clerk.

Matthew's resume makes clear that he is passionate about becoming a judicial clerk. He has externed with several judges and I know from our discussions that Matthew understands just how much he can learn about the law and legal profession by clerking. I know he would bring great enthusiasm to the position, as he does to all of his commitments. Matthew is a joy to work with. I give him my highest recommendation.

Sincerely,

Thea Johnson
Associate Professor of Law

May 11, 2022

The Honorable Kenneth Karas
Charles L. Brieant, Jr. United States Courthouse
300 Quarropas Street, Room 533
White Plains, NY 10601-4150

Dear Judge Karas:

I am writing this letter of recommendation in support of Matthew Kountz and his application for a judicial clerkship. Since Matthew's enrollment in my coordinated Evidence and Trial Advocacy courses, I have had the pleasure of teaching and engaging with him on a frequent basis. Throughout my Evidence course, Matthew demonstrated that he is a very dedicated, intelligent and hard-working student. Matthew earned an A-, which was a very high grade in a course with a strict curve, and consistently demonstrated his knowledge of the course material. Matthew also passed Trial Advocacy after the Law School transitioned to a mandatory pass/fail grading system due to Covid-19.

Evidence was taught through a combination of lecture, readings, demonstration, and problems. Each student was responsible for the daily preparation of assigned problems that are designed to work through and teach certain evidentiary concepts. Each student had to be prepared to discuss all the assigned problems, sometimes totaling more than fifteen per class session. The various problems also emphasized the importance of theory choice by lawyers, as well as the interrelationship among the rules of trial procedure, ethics, and evidence. Students were evaluated by their level of preparation and understanding of these various problems and the assigned material.

Throughout the semester, Matthew was consistently called upon to answer and discuss the possible resolution of various problems. He demonstrated his thorough and careful preparation each time that he was called upon. Throughout the semester, I cannot remember a single instance where Matthew had not thought through the evidentiary issues in the assigned problems and come to the correct conclusion. One thing that stood out with Matthew is that as the semester progressed, I was able to challenge him with more difficult aspects of a problem. For example, one of our problems might be focused on one rule that we were studying. However, I was able to push him to think about the interaction of other rules on a particular problem. These were rules that he was asked to consider in preparation for his argument. For example, when we were studying hearsay, Matthew would be able to clearly articulate the part of the hearsay rule that would exclude or admit a piece of evidence. Sometimes on that type of question, I would ask him to argue whether it might be unfairly prejudicial or was improper character evidence. As the semester progressed, Matthew was able to argue the rule we were studying but incorporate rules that we had studied much earlier in the semester. The ability to go beyond the silo of just one rule is something that I do not often see throughout the semester to the level Matthew was able to demonstrate.

His performance on the final exam also demonstrated his ability to understand and apply many difficult concepts in resolving complicated evidentiary matters. His exam was exceptionally well written under intense time pressure.

Matthew was also a student in my Introduction to Trial Advocacy. We were more than halfway through the course when the Law School was required to teach online and go to a pass/fail grading system. However, Matthew was clearly working at a very high level in Trial Advocacy. This course provides students with the training necessary for effective performance in the courtroom and to deepen their understanding of evidence. The students present opening statements, direct and cross examinations, and closing arguments. Trial advocacy skills are developed through students' presentation of solutions to problems at weekly class sessions. The problems require students to examine witnesses; introduce physical, documentary, and other types of evidence; present and challenge the testimony of expert witnesses; present opening and closing arguments; and select a jury. Each class begins with both a lecture and demonstration that prepares students for the following week's performance session.

Prior to going online, Matthew was able to demonstrate all the fundamental skills of direct and cross examination. Each week, he would take the comments from faculty on his performance and incorporate them seamlessly into the following week of performance. Matthew also showed his deep understanding of case theory when delivering his opening statement and closing argument. His theory was clear while marshalling the facts that supported his chosen theory and excluding those that were irrelevant.

I am confident that Matthew's demonstrated ability will make him a successful judicial clerk. Mathew will be clerking with Judge Kurt Kramer of the New Jersey Superior Court which will add to his research and writing experience. Mathew was able to gain additional experience with his research and writing as a Staff Editor for the Rutgers Journal of Law and Religion and as intern for Justice Barry Albin of the New Jersey Supreme Court. It is my pleasure to unequivocally and without hesitation recommend Matthew. Please do not hesitate to contact me directly at (856) 225-6222 if I can be of any further assistance.

Sincerely,

J.C. Lore III
Director of Trial Advocacy
Distinguished Clinical Professor of Law

John Lore III - jclore@camden.rutgers.edu - (856) 225-6222

John Lore III - jclore@camden.rutgers.edu - (856) 225-6222

Matthew Kountz
(856)979-4383 • Matthewskountz@gmail.com • 1 Market St, Apt 268 Camden, NJ 08201

WRITING SAMPLE

This writing sample is an excerpt of a memo to the Hon. Kurt Kramer, J.S.C., on a motion for Post-Conviction Relief – the State of New Jersey's counterpart to Habeas Corpus – that I drafted as a law clerk. In this matter, the Defendant sought to have his conviction vacated for two reasons. First, the Defendant claimed that his trial attorney did not inform the court of a statement made by a former probation officer during a break during trial, outside the courtroom, in the presence of certain members of the jury, which would indicate to the jury that the Defendant had a criminal history. Second, and more importantly, the Defendant claimed that his trial attorney did not give him adequate advice related to his plea offer. The Defendant declined the plea offer and was subsequently found guilty at trial and sentenced to significant time in prison. This work reflects my own writing and has not been edited by anyone besides me.

VI. Legal Analysis

To be entitled to Post-Conviction Relief, the Defendant must show that his counsel was deficient and that counsel's performance prejudiced the defense under the two prong test set forth in *Strickland v. Washington* 466 U.S. 668, 687 (1984). To establish a prima facie case of ineffective assistance of counsel under *Strickland*, the Defendant must meet the two-factor test established therein.

Generally, the *Strickland*, two-part ineffective assistance of counsel test states that counsels was ineffective if (1) counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.[1] *Strickland*, 466 U.S. at 694. In *Strickland*, the Court defined deficient performance as "errors [that] 'resulted in actual and substantial disadvantage to the course of [the] defense.'" (quoting *Washington v. Strickland*, 629 F.2d 1243, 1262 (5th Cir. 1982)).

With respect to an attorney's efficacy pre-trial, the Supreme Court has extended a defendant's Sixth Amendment right to counsel to the plea-bargaining process. *See Lafler v. Cooper*, 556 U.S. 156, 162 (2012) (expressly extending this right to plea bargaining stage).

With regard to the first issue, the court asks: was trial counsel ineffective concerning the alleged comments related to the probation officer? A defendant's right to be tried before an impartial jury is one of the most basic guarantees of a fair trial. *See* U.S. CONST. amend. VI; N.J. CONST. Art. I, ¶ 10. Additionally, "[c]ommon sense dictates that jurors should be shielded from any external factor that might induce bias or prejudice, and therefore destroy the impartiality necessary for a fair trial." *State v. Loftin*, 191 N.J.172, 189 (2005). Here, Defendant claims that

[1] The New Jersey Supreme Court adopted this two-part *Strickland* test in their holding of *State v. Fritz*, 105 N.J. 42 (1987).

four members of the jury were exposed to information related to a past criminal conviction when his former probation officer approached him at a break during trial.

The Court finds that there has not been a prima facie showing of the alleged comments. A prima facie showing describes evidence that is "[s]ufficeint to establish a fact or raise a presumption unless disproved or rebutted." *Black's Law Dictionary* 1228 (8th ed. 2004). The Defendant has not provided the name of the officer, testimony by the officer, a signed affidavit from the officer, sufficient proofs related to defense counsel's knowledge of the statements and most importantly, how this alleged comment would have influenced the outcome of the trial. As a result, bald assertions that comments were made in front of the jury have not risen to the level of a prima facie claim from the evidentiary hearing.

Nevertheless, even if a prima facie showing had been made, this would not have resulted in the vacating of the Defendant's conviction. If the statements were made and defense counsel had been made aware of them, defense counsel could have moved for a limiting jury instruction for the jury to disregard any out of court statements or, in the alternative, moved for a mistrial.

With respect to the jury instructions, a failure to request jury instructions is reviewed under the plain error standard. *State v. Dunbrack,* 245 N.J. 531, 544 (2021) (citing *State v. Funderburg*, 225 N.J. 66, 79 (2016)). The plain error standard has a simple, two-part test to determing if the error was clearly capable of producing an unjust result.

> The plain error standard requires a twofold determination: (1) whether there was error; and (2) whether that error was 'clearly capable producing an unjust result,' R. 2:10-2; that is, whether there is 'a reasonable doubt . . . as to whether the error led to the jury to result it otherwise might not have reached.'
> *Id.* (quoting *Funderberg*, 225 N.J. at 79).

Here, if the Court had found that the Defendant satisfied the first prong of the plain error standard – that an error did occur – there was no evidence presented that it was "clearly capable

of producing an unjust result." The Defendant produced no witnesses on his behalf and did not produce evidence that trial was otherwise in his favor prior to the alleged incident.

Additionally, if defense counsel had not sought a limiting jury instruction, defense counsel could have moved for a mistrial. However, granting a motion for a mistrial is an "extraordinary remedy" which should be exercised only when necessary "to prevent an obvious failure of justice." *State v. Yough*, 208 N.J. 385, 397 (2011) (quoting *State v. Harvey*, 151 N.J. 117, 205 (1997)). Therefore, when arguing that counsel is ineffective for failing to file motions, a defendant "must satisfy both parts of the *Strickland* test [and] also must prove that his . . . claim is meritorious." *State v. Fisher*, 156 N.J. 494, 501 (1998). It is axiomatic that counsel cannot be ineffective for failing to argue a baseless legal position. "It is not ineffective assistance of counsel for defense counsel not to file a meritless motion[.]" *State v. O'Neal*, 190 N.J. 601, 619 (2007).

In this case, the defense has not presented a prima facie showing that either the statements were made nor that defense counsel was made aware of the statements. In the event that this showing had been made, the Defendant, further, has not shown that the statements were "clearly capable of producing an unjust result" nor "necessary to prevent an obvious failure of justice." *Dunbrack*, 245 N.J. at 544; *Yough*, 208 N.J. at 397. Thus, the first prong of the *Strickland* two-prong test, counsel's performance was decifient, has not been satisfied.

With regard to the second issue, the court asks: was trial counsel ineffective concerning the advice she her client about the plea agreement? The majority of the evidentiary hearing's testimony was releveant to this issue. As previously mentioned, Defendant's have a constitutional right, under the Sixth Amendment, to the effective assistance of competent counsel at the plea bargaining stage. *See generally, Lafler v. Cooper*, 566 U.S. 156 (2012). The Supreme

Court has used the American Bar Association's standards of practice as a guide for the norms of effective representation. *Padilla v. Kentucky*, 559 U.S. 356, 366-67 (2010) (noting that while these standards are "only guides," they are still valuable measures).

Turning to the American Bar Association, ABA Criminal Justice Standards 4-3.3(b) provides:

> (b) Counsel should interview the client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with the client. Consultation with the client regarding available options, immediately necessary decisions, and next steps, should be a part of every meeting.[2]

Additionally, the Standards 4-3.3(c)(vi) and (vii) also note that defense counsel should discuss "the range of potential outcomes and alternatives, and if convicted, possible punishments" and "if appropriate, the possibility of costs and benefits of a negotiated disposition, including one that might include cooperation with the government."[3]

Turning now to authority relevant to counsel's duty to advise their client of plea offers, the New Jersey Rules of Professional Conduct place the decision of whether to settle a matter, enter a plea of guilty, proceed to a jury trial and whether the client will testify in the hands of the defendant. *See New Jersey Rule of Professional Conduct R. 1.2(a)* ("In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial and whether the client will testify."). Similarly, New Jersey Rules of Professional Conduct R. 1.4, requires the attorney to communicate in a manner that is appropriate for the representation of the client. R. 1.4(b) states that "a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information"; while 1.4(c) states "a lawyer shall explain a matter to the extent

[2] American Bar Association, Criminal Justice Standards for Defense Function (4th ed. 2017).
[3] *Id.* at 4-3.3(c)(vi)-(vii).